THE EVOLVING CONCEPT OF FLEXIBLE INTEGRATION WITHIN THE EUROPEAN UNION: A TOOL FOR MANAGING DIVERSITY?

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ABSTRACT

THE EVOLVING CONCEPT OF FLEXIBLE INTEGRATION WITHIN THE EUROPEAN UNION: A TOOL FOR MANAGING DIVERSITY?

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This thesis scrutinizes "flexible integration" as an evolving concept within the European Union. It aims to understand the framework in which the debate on flexibility has taken place before the institutionalisation of the mechanism with the Treaty of Amsterdam through examining the different conceptualisations, past examples and the political debate associated with these examples. After analysing the Treaty provisions on flexible integration, the thesis attempts to answer the question whether this mechanism can be perceived as a tool for managing diversity in economic and political sense.

Key words: European Union, flexible integration, Intergovernmental Conference, Treaties of European Union

ÖZ

AVRUPA BİRLİĞİ'NDE GELİŞMEKTE OLAN BİR KAVRAM OLARAK ESNEK ENTEGRAYON: ÇEŞİTLİLİĞİN SAĞLANMASINDA BİR ARAÇ?

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Bu tez, "esnek entegrasyon" kavramını Avrupa Birliği içerisinde gelişmekte olan bir kavram olarak incelemektedir. Bu tez, Amsterdam Andlaşması ile bir AB ilkesi haline getirilmeden önce, farklı kavramlaştırmlar, pratikteki eski örnekler ve bu örneklere eşlik eden gidien sisyasi tartışmaların incelenmesi yoluyla esnek entegresyon mekanizmasının içinde geliştiği çerçeveyi anlamayı amaçlamaktadır. Tez, mekanizma ile ilgili Andlaşma maddelerinin incelenmesinden sonra, bu mekanizmanın Avrupa Birliği içerisindeki ekonomik ve siyasal çeşitliliğinin sağlanmasında bir araç olup olamayacağı sorusunu cevaplamaya çalışmıştır.

Anahtar kelimeler: Avrupa Birliği, esnek entegrasyon, Hükümetlerarası Konferans, Avrupa Birliği Andlaşmaları

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INTRODUCTION

The European Union has been going through major structural changes since its establishment by the Treaty of Rome in 1957. The speed of the changes has significantly escalated within the last decades. The Union is continuously either amending existing Treaties, or preparing a new Treaty and expanding the scope of policy areas, or even more strikingly, doing all of them at the same time. The Single European Act, Treaties of Maastricht, Amsterdam and Nice led to significant alterations in the Union. The European Community has been transformed into a Union of three pillars. Within the Community pillar, a Single Market is achieved, so is the Economic and Monetary Union. In the second pillar, Common Foreign and Security Policy, the Union strives to be a more influential, effective and coherent actor in the world affairs. Cooperation among the Member States is also expanding in the third pillar, Justice and Home Affairs issues.

These developments constitute a "deepening" aspect of integration. The Union is not like the one that was first established in 1957. It is becoming more involved in the daily lives of people with a wide range of issues that falls within its scope of responsibilities. A further step has been taken with the debate on the "Future of Europe" which was initiated with the speech of German Foreign Minister Jocshka Fisher in 2000 during the last stages of the Intergovernmental Conference of 2000. One year after the IGC 2000, the Laeken Declaration of December 2001 called for the establishment of the European Convention and this led to the formation of a Constitution. A final agreement was reached on the "Constitution for Europe" by European Union leaders on 18 June 2004 at the Brussels European Council which waits to be ratified by all Member States.

There is another aspect of integration which goes concurrently, but uneasily with deepening; "widening". The Union is not only expanding its policy areas, or furthering its involvement in existing policy areas but it is also enlarging its geographical boundaries with the accession of new members. The Union has undergone five rounds of enlargements starting in 1973 with the accession of Denmark, Ireland and the United Kingdom. This was followed by Greece in 1981, Portugal and Spain in 1986 and Austria, Sweden and Finland in 1995. In May 2004, the most different and difficult round of enlargement took place. This one differed from the earlier ones in terms of both quality and quantity. The Union welcomed 10 new Member States: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. The increasing number of Member States makes it difficult to reach compromise on policies and results in cumbersome decision-making procedures. This presents a challenge for the deepening process. Having perceived the threat of possible deadlock in decision-making and institutional structure, the Union has decided to implement institutional reform in two ways. First, the internal reforms that are initiated by the institutions, namely the European Commission with its White Paper on Governance published in 2001 and the European Council. Second, there is treaty reform which started with the Treaty of Amsterdam of 1997 and was followed by the Treaty of Nice in 2000 and the Constitution for Europe in 2004.

This thesis aims to discover the role of flexibility within the debate on both deepening and widening. The European Union, with its unique structure assuming both supranational and intergovernmental features, has been facing a challenge of diversity in the economic and political sense. Deepening, as the expansion of its policy areas and widening, as the increase in the number of Member Sates of the Union, are the reasons behind this challenge. This study attempts to understand whether flexibility is an operational tool for reconciling diversity.

In order to answer this question this study first attempts to clarify the terms relating to flexibility. A wide range of terms is used to represent different aspects of differentiated integration, such as: multi-speed, multi-tier, two-tier, hard-core, a la carte, variable geometry, concentric circles and many others. A lack of uniform

understanding prevails both in the academic and political debate. Rather than trying to find a uniform definition and this study tries to highlight the different approaches. Within this plethora of concepts three are taken as the main forms: multi-speed, à la carte and variable geometry. The advantages and the risks of each mode will be examined and the main three forms will be compared. This serves to give the general framework in which the issue of flexibility is debated and to understand how the concepts are perceived differently in the academic arena.

Examples of differentiated integration have been seen since the establishment of the Union; even before it was legally defined in the Treaties. The transitional agreements and the opt-outs given to certain Members States from social policy to EMU will be observed as examples of differentiated integration within the Treaty framework. In addition, certain arrangements concluded among some Members States, but outside of the Treaty framework, will also be mentioned. Through examining these examples, this study aims to illustrate that differentiated integration has been a part of the EU practice since its establishment.

Examples in the history of the EU are accompanied by the historical and political debate associated with them. Discussions on the issue of flexibility in the history of the EU have been triggered by political developments and potential deadlocks in policy areas such as monetary system, social policy, security issues and enlargement. This study attempts to clarify how the political debate shaped the discussions on and the practice of the mechanism.

The institutionalisation of the mechanism as “closer cooperation” with the Treaty of Amsterdam marks an important stage within the discussion on flexibility. Although there used to be several different examples of differentiated integration within the history of the Union, the question of whether to lay down an article for institutionalising the mechanism within the Treaties started to be discussed only before the IGC 1996. The reasons for why the final decisions were made to legally establish the mechanism are observed in third chapter. Next, the political debates that shaped the agenda and the Treaty provisions, the views of the Member States and the EU institutions both during the preparatory stage and the IGC are given. The

provisions, which are the outcome of the negotiations, are examined in detail in order to understand the legal structure in which the mechanism can be implemented.

The closer cooperation provisions of the Treaty of Amsterdam have been subject to amendments twice, even before they were implemented. The first amendment was with the Treaty of Nice in 2000 and the second was one with the Constitution for Europe in 2004. The next two chapters analyse these Treaties. They examine the reasons for why the idea of amending the provisions was on the agenda. The chapters question the process and the outcome.

The provisions are the outcome of a long and difficult process. Different approaches of Member States towards the integration process in the Union were reflected in the debate on flexibility. National preferences of Member States, discussions at technical level were influential in shaping the provisions. Therefore, the provisions of the Treaties were evaluated by taking into account this negotiation process and the conflicting national interests that they comprised.

These detailed analyses of the IGC processes and the provisions serve to understand the evolution of the mechanism. The thesis concludes with an assessment whether this mechanism will be operational and weather it will be fit to manage the diversified economic and political interests within the Union; while at the same time preserving its uniformity.

CHAPTER 2

THE DEBATE ON FLEXIBILITY

This chapter presents a general picture of flexible integration before the mechanism was institutionalised with the Treaty of Amsterdam. Its aim is to provide early examples of flexible integration drawn from the political and historic debate.

First, the chapter defines the main concepts used in flexible integration in order to clarify current conceptual differences brought on by historically divergent approaches to the integration process over time. "Multi-speed", "variable geometry" and "à la carte" are examined individually; their origins, what kind of differentiated integration they reflect and the risks they present are also discussed. Lastly a comparison of these different modes of differentiated integration is introduced.

These different forms of flexibility reflect different approaches to the integration process. For a Union that is already a mixture of intergovernmentalism and supranationalism it is natural to witness different modes of differentiated integration.

The second part of this chapter examines several examples of flexible integration before its institutionalisation with the Treaty of Amsterdam. Even before the Treaty it is possible to see early examples of differentiated integration in the EU practice. Some of these examples coincide with successive enlargement rounds and their transitional agreements. Flexibility mechanisms were used as tools, particularly, when there has been a deadlock in deepening regarding the policy areas, such as social policy, EMU and CFSP. The chapter also examines these early examples that have been exercised within the framework of the EU and those that fall outside of the scope of the Union.

Lastly, the chapter illustrates the historical and political debate on the issue; its turning points and crucial dates in the history of the mechanism. Starting with very early discussions in the 1970s and through a detailed examination of the debate in the 1990s the chapter highlights the importance of these discussions in the shaping of the mechanism with the Treaty of Amsterdam.

2.1 Conceptualisation

The conceptualisation of the term flexibility is quite difficult due to the nature of the subject. The terminology varies widely that many different terms are used within the general debate of flexibility. The elasticity of the concept results in a wide range of connotations from positive to negative that are biased respectively towards inclusion and exclusion. Thus they reflect different point of views of scholars and politicians on the integration process of the Union within the general debate of flexibility. In one of the articles published in Economist it was stated that "*flexibility means different things to different people which is probably why so many people like it"* (Economist, 18.1.1997). For the Euro-sceptics, for example it is seen as a way of opting out from certain policies, whereas for the pro-integrationists it is the solution to by-pass the reluctant Member States to go further towards deeper integration. Therefore, the concept is used to satisfy the varying expectations and needs of both the Member States and the EU institutions (Shaw 2002: 6).

In broad terms, one can define flexibility as "*varying levels, patterns and modes of membership in a compound political structure*" (Shaw 2002: 3). Yet, the concept is heterogeneous and as it is mentioned above within the general definition so many terms such as à la carte, multi-speed, two-speed, hard-core, two-tier, two-track, multi-tier, opt-out, opt-in, avant-garde, etc. have been used. It is essential to mention that not all the terms are interchangeable. They usually refer to different meanings of the general term flexibility. The meaning of a term even sometimes differs from one scholar or politician to another. As to give an example; what Ralf Dahrendorf, former EU Commissioner in the 1970s understood from the term "à la carte" differs from the conceptualisation of the British Prime Minister John Major in the 1990s.

Dahrendorf perceives this form of integration as a challenge to the prevailing static interpretation of the EC and the *acquis,* whereas according to Major it means 'to pick and choose' (Edwards and Philippart 1997: 2). Therefore, a clarification is needed for the purposes of this study, not to adopt one point of view but to understand what the actors and scholars understand from different concepts. More importantly it is necessary to identify the intentions behind using those particular concepts.

It should also be added that the time factor is also important in conceptualisation. The discussion has been transformed since 1970s with the direction that the integration process is moving forward. Therefore, the same term could have been used with a different connation in the past than today's meaning. Another reason for differences in conceptualisation is the different aspects of the discussion. The issue of flexibility is the subject of an academic and at the same time a political debate. Certainly the approaches of the politicians differ from the approach of the academics and the legal experts. The political aspect of the debate link ups the issue more with political approaches of the Member States towards integration process. Academics and legal experts, deal more with the technicality of the concepts.

There have been some attempts to categorise the concept. For example Stubb (1996, 1998, 2000) and Ehlermann (1997) categorises the concept in terms of three variables of "time", "space" and "matter", whereas some others such as Wallace (2000) defines the type of flexibility in terms of ends, depending on either there is common end or a different one. One can also add the categorisation of Herolf in terms of time and scope (1998a), which is more close to the categorisation of Stubb and Ehlermann.

Mainly there are three principal forms of flexibility that express different approaches towards the issue, namely multi-speed integration, à la carte integration and variable geometry. After examining all three forms individually by pointing out the emergence of the concepts, their definitions, characteristics, and criticisms against every each concept, a comparison between them will be made.

2.1.1 Multi-speed

The term, multi-speed was first used by Willy Brandt in 1970s, coinciding with the early years of the adoption of the Werner Plan for European Monetary System, to explain the relative levels of economic performance, especially in the German discourse. Wallaces point out the pejorative approach towards the terms resulted from the fears from both the prosperous and less prosperous countries. According to prosperous countries it would mean supporting the less prosperous, whereas for less prosperous the fear is being left behind by the more prosperous (Wallace and Wallace 1995: 55).

In the recent debates multi-speed type of differentiation is defined by Stubb as;

> the mode of differentiated integration according to which the pursuit of common objectives is driven by a core group of Member States which are both able and willing to pursue some policy areas further, the underlying assumptions being that the others will follow later (Stubb 1996: 287; Stubb 1998: 53; Stubb 2002: 45)

He explains the term with the 'time' variable in that the realization of the common objectives differs in time. Warleigh sets "capacity" as the main variable that although all Member States will eventually adopt the same policies, some of them lack capacity to implement in the short term (Warleigh 2002: 10). Most scholars agree that there is a common aim but different pace towards to achieve it (Stubb 1996, 1998, 2002; Warleigh 2002; Dehaousse 1995).

Multi-speed differentiation provides the preservation of the *acquis* and the common objectives (Stubb 1998: 54). Thus a possible undermining of the Community system and violation of solidarity are prevented. (Stubb 1996: 287). Flexible integration, therefore, is assumed to work as an impetus to further integration for the whole community, not the opposite.

Some related concepts that are used within the same meaning are two-speed, step-by-step, variable speed, graduated integration.[1]

[1] Main three forms of terms differentiated integration and their related concepts have also their correspondents in French and in German. And these correspondents not all the time match to the same meaning. Therefore, existence of many terms with the inclusion of these terms in different language

Another concept, which is close to multi-speed, is the term "avant-garde". According to Dehousse, differentiated integration would involve an avant-garde group rather than a hard core in which a transitional system must be provided for the countries that wish to join but unable to associate with the avant-garde. The door must also be left open to the unwilling ones (Dehousse 1995: 110).

The approach also differs from one Member State to another. In the research paper of the House of Commons of Britain, Germany was accused to view the term as "tiered, with an elite group pushing ahead and a "second class" group chugging along behind" whereas the British Government envisaged not just two, but a number of tracks and speeds (Miller 2000: 32).

As it is mentioned above, this approach also carries the risk of creation of a hard-core and contrary to the assumption that the latecomers would be able to join the further integration process, in reality distinction between the ones in the core and the ones who are willing but unable or able but unwilling could remain still or could even increase. The creation of a hard core is not desirable for all (Wallace and Wallace 1995: 13; Miller 2000: 32). Multi-speed approach with the creation of a hard-core could be more associated with the German approach to European integration. This approach is spelled out with the paper of Lamers-Schauble (supra 29).

Differentiation in the mode of multi-speed has already been an integral future of the Community. According to Dehousse the idea of multi-speed Europe is as old as European integration itself (Dehousse 1995: 106). Transitional agreements, particularly the exemptions given during the accession periods in terms of the enlargement processes are the most noticeable examples to be given. These exemptions as a rule are granted only for a specific period of time and by the end of this time the ordinary rules prevail over the transitory clauses (Thürer). The EMU also constitutes an example of multi-speed integration according to Stubb as with the

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make the conceptualisation of the issue even more difficult.

exception of some Member States, in general common objectives were set out which were to be reached in due course.[2]

2.1.2 À la carte

The second type of differentiation is the à la carte Europe model. The phrase was first coined by Dahrendorf in 1970s, indicating the existing of common policies in which not all the members take place. Yet in the recent debates what is understood by the term is different than the original.

Stubb defines the concept in terms of "matter" by focusing on specific policy areas, that à la carte type of differentiation "*allows each Member State to pick and choose, as from a menu, in which policy area it would like to participate, whilst at the same time maintaining a minimum number of common objectives*" (Stubb 1996: 288; Stubb 1998: 61; Stubb 2002: 52). According to Thürer this type of differentiation is;

> characterized by the political freedom of states to apply for membership or to become a member of an organization or arrangement; by the absence of an overarching common goal and institutional framework, and by the fact that, as a result of this conception, the "common" law holding the states together is the "lowest common denominator" agreed to by the respective states within the arrangements (Thürer).

Based on their political wills, goals, interests or priorities, the Member States are free to opt in one, several or all of these institutions or arrangements (Thürer). Therefore, the point to be emphasized here is the political will of the Member States. They choose not to participate in some policies (Warleigh 2002: 11).

According to Fratianni, à la carte form of differentiated integration would even give the opportunity to pick and choose from the smaller areas of Single Market which is normally marked with the uniform policy. Fratianni suggests that Europe à la carte permit to break down the Single Market Program into smaller areas, such as

[2] In this part of the study the examples under each form of differentiated integration will be mentioned briefly. However in the next part, the examples are going to be discussed more in detail to illustrate that even before the institutionalisation of the mechanism with the Treaty of Amsterdam there is a wide range of practices concerning flexible integration.

agriculture, industry, government and so on. And Member States would be able to have permanent exceptions from certain policy areas (Fratianni 1996: 18).

Related concepts to the term "à la carte" are pick and choose, opt-put… As it can be understood from the definitions, in contrast to multi-speed, there are no common goals and common institutional structure in à la carte type of flexibility. This approach is more based on 'what' the Member States opt out of, and an opt-out usually refers to the undermining of both the *acquis* and the common goals (Stubb 1998: 62).

À la carte mode of flexibility is also criticised. This approach may lead to disintegration and lack of unity if all Member States would start to choose on which issues to participate. If one government questions certain Community policies, this will encourage others to do the same. The increase of *ad hoc* and intergovernmental procedures eventually would result in the disappearance of the disciplines and the mutual obligations (La Serre and Wallace 1997: 7). The Belgian Prime Minister Luc Dehaene also recalls the danger that Europe a la carte hides. In his speech at Institut Français des Relations Internationales, Paris, 26 October 1994 he pointed out the risk of lack of coherence which would grow if each could choose what suited him and abandoned that policies which did not suit him (in Dehausse 1995: 107).

À la carte form of differentiated integration resembles the intergovernmental approach; it tries to preserve the *status quo* in the name of somewhat outdates concept of national sovereignty (Dehausse 1995: 107). Therefore, à la carte approach is associated with the classical British policy, in particular with Thatcherims followed by Major, whereas multi-speed approach is correlates to Germans approach to European integration.

However, it is not possible to say that an á la carte mode of differentiation is solely an intergovernmentalist mode. It does not reject all common objectives and institutional structure of the Union. An á la carte Europe, therefore, can be defined as a minimum core of common policy areas with its common institutional framework and opt-outs beyond this policy core.

Some examples of à la carte integration in the EU can be named as the choice given to the United Kingdom to opt out from Social Chapter in Maastricht and, the opt-outs of the UK, Ireland and Denmark partly or completely from Schengen. The British and Danish derogations from the EMU can also be considered as examples of à la carte type of integration -since these states chose not to participate in the third stage of EMU based on their political will, not because of their incapability- along being mentioned as an example of multi-speed approach in the previous sub-title. Therefore, à la carte type of differentiation in the EU has been also a part of the Community process of integration.

2.1.3 Variable Geometry

Variable geometry is the type of flexibility in between the two type of integration forms mentioned above. Originally it was used in the French discourse in 1970s. The original metaphor was "*the configuration of the wings of the aircraft, assuming that the composition of the body and of the engine would rest on different and less changeable criteria*" (Wallace and Wallace 1995: 57). Rather than exclusion of some states, the term more inclines participation (Wallace and Wallace 1995: 56).

One of the definitions of variable geometry of today's conceptualisation is made by Stubb as "*the mode of differentiated integration which admits to unattainable differences within the main integrative structure by allowing permanent or irreversible separation between a core of countries and lesser developed integrative units*" (Stubb 1996: 287; Stubb 1998: 57; Stubb 2002: 48). This type of differentiated integration corresponds to differentiation by space in Stubb's terms. As a mode of institutionalising diversity, with this way there would be multitude of integrative units with a less ambitious approach by taking into account the European political, cultural and economic diversity (Stubb 1996: 287). Ehlermann, while adopting the definitions of Stubb, argues that the decisive variable for variable geometry should not be "space" but matter as it is for the à la carte type of differentiated integration. Taking matter as the variable for both terms, Ehlermann differentiates the concepts by the degree to which differentiation according to subject matter is allowed. In the case of "variable geometry", the major part of Community activity and law is considered to be unaccessible to the use of differentiation by subject matter. In the

case of "à la carte", however, the unaccessible area is very small or even non existent (Ehlermann 1995: 6).

Thürer, on the other hand describes the concept as *"a certain measure of liberty"* within the same common legal order. According to Thürer, having taking into account the common goal in the background the room is left open for special arrangements chosen by the members and granted to them under special circumstances (Thürer).

Warleigh's approach is rather different. Firstly, he prefers to use the term "concentric circles" instead of variable geometry. Like it was the case for multi-speed, the main cause of differentiation is "capacity". However, Member States are incapable of adopting certain policies not for a short term but for long periods of time, maybe forever. This type of differentiated integration resembles a football league with different divisions. Each Member State should join the division which corresponds to the degree of EU legislation with which is able to comply (Warleigh 2002: 10).

The concepts used with a similar meaning to variable geometry are two-tier, multi-tier, two-level, many circles, multi-track, two-track, etc.

As Stubb puts it correctly, this approach goes beyond the common goals and the *acquis*, and puts the emphasis on 'who opts into what' (Stubb 1998: 57). Therefore not all Member States share particular goals. This results in some variable geometry examples outside the framework of the Union; the WEU, Europcorps, Eurofor within the area of second pillar and pre-Amsterdam arrangements of the Schengen Agreements in the field of third pillar.[3] The more intergovernmental nature of the second and the third pillar resulted from more diversified interests and priorities of the Member States, leads to a variable geometry type of differentiated integration outside of the Treaty. Yet there are also examples of variable geometry within the treaty framework. One example is the Article 168, corresponds to cooperation

[3] With the incorporation of the Schengen Agreement into the Treaty, it became an example of variable geometry within the treaty.

regarding research programmes, for which participation of all Member States is not required (Stubb 1998: 59).

There is a debate on whether the EMU constitutes an example of multi-speed integration or variable geometry. One can argue that EMU in relation to the exceptional provisions for Britain and Denmark marks the borderline case of multi-speed type of integration since both Member States subscribed to the goals of Monetary Union. On the other hand the traditional bounds on differentiation in community law were greatly overstepped. Although it might be arguable that the derogations given to these two states can be considered as the examples of multi-speed Europe, according to Ehlermann in reality these derogations are the clear examples of variable geometry (Ehlermann 1995: 10). Stubb, however, perceives the EMU as an example multi-speed approach.

The situation for the other states, other than Britain and Denmark, which cannot fulfill the criteria, is quite different. In this case according to Ehlermann the EMU is fully compatible with the traditional interpretation of Community law. It is a classical example of the "multi-speed" concept (Ehlermann 1995: 11; Ehlermann 1997: 4). Yet one can suggest that EMU characterizes both two types of flexibility which are variable geometry and multi-speed integration. In terms of variable geometry the two Member States, namely Denmark and the United Kingdom have preferred to remain outside of the EMU. On the other hand, the second category consisting of

Greece and Sweden[4] at the time when the article by Wijkman was written, characterises the category of "willing but unable" Member States. These countries were asked to fulfil the convergence criteria. By the time Greece, which has accepted the goal of the EMU all the time, was also qualified by fulfilling the criteria, therefore became a member of the EMU in 2001 as well. Therefore, Greece is the example of the possibility of joining the mechanism in a later date. Wijkman

[4] Sweden forms another interesting aspect of the EMU. Unlike Denmark and the UK by signing the Maastricht Treaty without any opt-outs regarding the EMU, Sweden was supposed to join the EMU once it fulfils the convergence criteria. Yet, the Swedish People with two referendums one of which was just took place in September 2003 rejected the common currency.

concludes that EMU with containing both aspects of variable geometry and multi-speed integration can provide an important model of facilitating a rapid enlargement to the East (Wijkman 1998: 72).

Therefore, while pronouncing the same policy area, the scholars may refer to different forms of flexible integration. It was also emphasized before that the conceptualisation of the concepts differs from scholar to scholar, therefore, their categorisation of the examples also differs according to their conceptualisation. The confusion therefore, results from the different approach of the scholars and also from the fact that a certain issue can be an example of different forms.

In the case of EMU, it can be given as the example of three different forms. To clarify, if one thinks about the examples in terms of the opting out of several Member States it constitutes the example of à la carte integration since Member States had the chance to pick and choose from a menu. On the other hand when one considers the examples from the point of view of the participant states, there is the example of a further integration, which goes beyond the common goals and the *acquis communautaire* that indicates an example of variable geometry. Yet in principle if all the Member States were subscribed to common goals, but achieving that goal in different paces, there exists an example of multi-speed form of differentiated integration. [5]

In terms of the criticism raised against variable geometry, it depends on how the term is defined by the scholars. For example, according to Warleigh, since the creation concentric of circles is the result of an inability to implement certain policies in long terms, this will cause the formation of a hard-core (Warleigh 2002: 11). Therefore, he criticizes the mechanism because of the risk of formation of a hard-core. [6] However, this criticism is far from reflecting reality. Instead variable geometry

[5] Concerning the Social Charter there are also different views. In this chapter the Protocol on the Social Policy is considered as the example of à la carte form of integration like Stubb. On the other hand Thürer, Laursen and Ehlermann (1995) point the Social Charter as the example of variable geometry.

[6] This criticism has been raised for multi-speed mode of differentiated integration by Stubb.

should be criticized because of the potential creation of different cores according to different areas of integration. This does not necessarily mean that the "core" would be same for every field of integration. Quite the opposite, the creation of conglomerations of integrative units carry the risk of complicating the system in the Union. Dehausse resembles the Union, which is fragmented into several groups of varying composition, as a headless body with its limbs moving without coordination (Dehausse 1995: 109).

2.1.4 Comparison Between the Three Main Forms:

Multi-speed type of differentiated integration and à la carte integration are the two extremes of the spectrum. Multi-speed integration is more ambitious, often shaped by the supranational set of common goals whereas an à la carte approach is more an intergovernmentalist way with the lack of common goals. The aim in multi-speed approach is to achieve the same goal but in different times. Yet in à la carte form of integration, differentiation is not in the timing but on the matters to integrate Member States. Therefore, the question is 'when' in terms of multi-speed integration whereas in the à la carte integration the question asked is 'what' (Stubb 1998: 63).

To make a comparison between the concepts of multi-speed and à la carte integration is reasonably easy as they constitute almost the two opposite notions on flexible integration. The third form; variable geometry, as it was stated above indicates a type of integration in between the two other forms. Differences between the concept of variable geometry and the two other terms are not as clear as the disparity between multi-speed and a la carte. The characteristics of these models are different form one scholar to another. Therefore, comparisons between these models differ from one scholar to another. For example, according to Warleigh, the concentric circles (variable geometry) model is the one that would lead to creation of the hard core, but not multi-speed integration. He compares the two types of models based on the timing of differentiation. Both in multi-speed and concentric circle main cause of differentiation is an inability to implement policy. In multi- speed this inability corresponds to the short term, whereas variable geometry expects and advocates more or less a permanent differentiation.

Laursen puts the difference between multi-speed and variable geometry in terms of the goal and speed. He states that the goals are the same in multi-speed integration whereas the speed of achievement of the goals differs. On the other hand, in variable geometry both the goals and speed are different (Laursen 2000). Then what is the difference between a la carte model and variable geometry, since in a la carte type of integration the speed and goals are both differ? Stubb tries to put the difference by emphasising the terms "opt in" and "opt out". In variable geometry the question is 'who *opts into* what?' while à la carte approach asks the question 'who *opts out* from what?' (Stubb 1998: 64). He also points out that variable geometry is more integrationist than à la carte approach in that variable geometry creates a hard core in a specific area (Stubb 1996: 288).

The comparison that Ehlermann makes in terms of the main models of differentiation is based on substance. While explaining the difference between the multi-speed one and the other concepts, "time" is the determinant. But comparison between variable geometry and à la carte can be explained by the decisive differences among the Member States upon the substance (Ehlermann 1997:2). Ehlermann states that variable geometry is possible only in marginal areas since a large part of the community law is excluded from this type of differentiation, whereas, almost all areas of Community law are open to an à la carte type of arrangement (Ehlermann: 2). This approach also explains why variable geometry constitutes usually a type of differentiation outside of the framework of the EU. Ehlermann also explains the

Table 1: Definitions, Categorisations and Examples of Flexible Integration by Stubb

THEORETICAL FLEXIBILITY & VARIABLES	**DEFINITION**	**PRACTICAL FLEXIBILITY AND VARIABLES**	**DEFINITION**	**EXAMPLES**
(1) Multi-speed **Time** **When** *1-15 MS* *IGC decision-unanimity*	Mode of flexible integration according to which the pursuit of common objectives is driven by a group of member states	***(1) Transitional flexibility*** **Time** **When** *1-15 MS* *IGC decision-*	Mode of flexible integration which is characterised by two-way transitional periods which allow either the new member state	EMU Directives Transition periods Articles: 15 (tc) 134 (115)

Table 1 (continued)

THEORETICAL FLEXIBILITY & VARIABLES	DEFINITION	PRACTICAL FLEXIBILITY AND VARIABLES	DEFINITION	EXAMPLES
EC budget *Acquis preserved* *Common objectives*	which are both able and willing to go further, the underlying assumption being that the others will follow later.	*unanimity* *EC budget* *Acquis preserved* *Common objectives*	or the old member states to adopt to a particular policy area, the underlying assumption being that the adaptation period is temporal.	
(2) Variable Geometry **Space** **Who** *½ MS if inside* *no IGC decision-QMV+ emerg. brake* *Special budget* *Beyond acquis* *Different objectives*	Mode of flexible integration which admits to unattainable differences within the main integrative structure by allowing permanent or irreversible separation between a core of countries and lesser developed integrative units	***(2) Enabling clauses*** **Space** **Who** *½ MS if inside* *no IGC decision-QMV+ emerg. brake* *Special budget* *Beyond acquis* *Different objectives*	Mode of flexible integration which enables the willing and able member states to pursue further integration- subject to certain conditions set out in the treaties- in a number of policy and programme areas within and outside the institutional framework of the Union	Old Schengen Airbus Ariane Esa Jet WEU Eurocorps Eurofor Euromarfor Articles: 11 (5a), 14 (J.3), 17 (J.4), 40 (K.12), 43 (K.15), 44 (K.16), 45 (K.17), 168 (130k),306 (233)
(3) A la carte **Matter** **Who** *1-3 MS* *IGC decision-unanimity* *Special budget* *Acquis undermined*	Mode of flexible integration whereby respective member states are able to pick and choose, as from a menu, in which policy area they would like to	***(3) Case-by-case flexibility*** ***(4) Pre-defined flexibility*** **Matter** **Who**	(3) Mode of flexible integration which allows a member state the possibility of abstaining from voting on a decision and formally declaring that it will not apply	UK and Social Charter UK and EMU DK and EMU DK and defence DK and III pillar DK and Title IV UK and Title IV

Table 1 (continued)

THEORETICAL FLEXIBILITY & VARIABLES	DEFINITION	PRACTICAL FLEXIBILITY AND VARIABLES	DEFINITION	EXAMPLES
Different objectives	participate, whilst at the same time holding only to minimum number of common objectives	*1-3 MS* *IGC decision-unanimity* *Special budget* *Acquis undermined* *Different objectives*	the decision in question whilst at the same time accepting that the decision commits the Union. (4) Mode of flexible inetgartion which covers a specific field, is pre-defined in all its elements, including its objectives and scope, and is applicable as soon as the treaty enters into force	IRL and Title IV UK and Schengen IRL and Schengen Article 23 (J.13)

Source: Stubb 2002: 51

difference by advocating that variable geometry is, at least implicitly, based on a plan; whereas à la carte implies absolutely free choice" (Ehlermann 1997: 3).

The different forms of differentiated integration prevent one from arriving at a clear-cut understanding of each model. Each form carries is own risk and indicates a different approach to the integration process. Yet they are all based in their own EU experience. The à la carte mode carries a risk of fragmentation with a intergovernmentalist tendency in the background. The multi-speed approach can result in a permanent distinction between the hard-core group and the laggards. A variable geometry approach would be more functional one since it represents a middle ground between the two. However, it also carries a risk that multitude integrations within the same institutional framework would complicate a system which is already foreign to its own citizens.

2.2 Examples of Differentiated Integration Before the Institutionalization of the Mechanism With the Treaty of Amsterdam

There are examples of flexible integration before the institutionalisation of the mechanism by the Treaty of Amsterdam. These examples were mentioned in the previous part very briefly. However, it is necessary for the aims of this study to examine the examples more in detail.

Within the debate of widening and deepening, the widening side, the subsequent enlargements led the way for temporary derogations that constitute one of the earliest examples of differentiated integration. Yet also deepening in terms of the increasing number of policy areas resulted in gradual emergence of a de facto tool (Shaw 2002: 9), differentiated integration in a more diverse EU. Therefore, these examples, no matter under which form of differentiated integration they can be described, are going to be given in this part to show that even before the institutionalisation of the mechanism with the Treaty of Amsterdam flexible integration was part of the community system. In the past experiences of the EU there are examples of differentiated integration within the framework of the Community, as well as some others which fall outside the framework.

2.2.1 Examples of Differentiated Integration within the Framework of the EU

Transitional arrangements are one of the most noticeable and earliest examples of differentiated integration in the Union which is related to widening. To overcome some of the difficulties in the post-accession period of the new Members States, the Union used to adopt some transitional arrangements as it has been in the case for successive enlargement processes. [7]

The intention was to reach the goals within a time limit set by granting transitory periods to certain Member States for certain specific action. By using temporary derogations it is aimed to apply the *acquis communautaire* through an agreed

[7] For more detail on the transitional arrangements see Becker, Ulrich (2001) "EU Enlargements and Limits to Amendments of the E.C. Treaty", Jean Monnet Working Paper 15/01.

timetable (La Serre and Wallace 1997: 10). One of the most important characteristics of the transitional arrangements is that, they have been limited to a certain limit of time. As Ulrich suggests correctly, the issue is not limited to substance but only in terms of timing (Ulrich 2001: 8). The length of the transition period depends on economic and legal difficulties that the acceding state faces and also economic constellations in certain sectors (Ulrich 2001: 8). Although it is suggested that all transition measures have temporary in character, there are some examples of transitional arrangements which have become more or less permanent, such as UK's import of New Zealand butter, derogations on environmental legislation of Greece and Portugal, the Austrian transit agreement which deferred the application of Community rules regarding the free transport access for heavy lorries (La Serre and Wallace 1997: 10).

Temporary derogations within the EU have been allowed unless the fundamental values of the Community itself, which define the identity of the Community, are affected or they create a discrimination of a permanent character between the Member States (Ulrich 2001: 15). Therefore the *acquis communautaire* and the common objectives are to be preserved.

The transitory clauses, therefore, correspond to multi-speed type of integration. It has aimed at the observation of the same common goals in a longer period for the new Member States which have the problem of adoption regarding certain policies. Yet it can be argued that it was not only for the new Member States' benefit, but also for the protection of the existing Member States. Interestingly as it can be seen in the previous accessions especially in the second round enlargement with the accession of Greece in 1981 and third round with the accession of Spain and Portugal in 1986 in particular the transitional arrangements regarding free movements of workers were, first of all, made in order to protect the old Member States. These derogations, however, are permissible if they are aimed at simplifying "the mutual adaptation and securing unity and equality in the whole Community area" (Ulrich 2001: 8).

In addition to the transitional agreements the Community has been experiencing other examples of differentiated integration. One of the earliest ones is given under

Article 233 of the Treaty of Rome. With this article, three Benelux countries; Belgium, the Netherlands and Luxembourg were given the option of developing closer cooperation amongst themselves if they wish to do so (Brown 2002: 3). Additional research programmes which were mentioned for the first time in the Own Resources Decision of 1970, then consolidated by the Single European Act with the title "Research and Technological Development" also constitutes an early example of differentiated integration according to Ehlermann (Ehlermann 1997: 3).

The SEA of 1986, which revised the Treaty of Rome, involves some examples of differentiated integration without institutionalisation of the mechanism, but rather by envisaging arrangements of temporary nature. Special agreements in Article 8c of the SEA are one of the examples. The article states that:

- Certain economies showing differences in development will have to sustain during the period of establishment of the internal market and it may propose appropriate provisions. If these provisions take the form of derogations, they must be of 'a temporary nature' and must cause the 'least possible disturbance' to the functioning of the common market.

Article 30a of SEA considers closer cooperation as an option for security issues:

- The High Contracting Parties consider that 'closer cooperation' on questions of European security would contribute in an essential way to the development of a European identity in external policy matters. They are ready to coordinate their positions more closely on the political and economic aspects of security.

Article 100a (4) adopts further special provisions with regard to applying national provisions on issues of environment. The Article states that:

- If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the

protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

According to Ehlermann, this article is the first example of unilateral "opting out" that can no longer be justified on traditional principles of Community law (Ehlermann 1997: 3).

Following chronologically, the Maastricht Treaty (ToM) of 1992 represents a more clear-cut distinction between the Member States. The Maastricht Treaty signifies a change in the original model. Before Maastricht, integration was uniform; membership was indivisible in the sense that all the members undertake mutual obligations and follow the same rules more or less in on the same basis (Wallace and Wallace 1995: 73). However, the distinction became clearer between the states that it was obvious that a uniform policy cannot be pursued regarding some issues. The Treaty marked a turning point according to Wallaces in terms of the issues that were decided since the issues on the agenda denote a history of selective involvement and contestation over whether the traditional community method[8] is acceptable (Wallace and Wallace 1995: 75).

Having taken into account the divergent approaches of Member States on integration, the ToM led to the formation of the 'European Union' with its three pillars, namely, the European Community, the Common Foreign and Security Policy (CFSP), and the Justice and Home Affairs (JHA). By creating a three-pillared system, Maastricht

[8] The Community method is the expression used for the institutional operating mode set up in the first pillar of the European Union. It proceeds from an integration logic with due respect for the subsidiarity principle, and has the following salient features:,

- Commission monopoly of the right of initiative;,
- widespread use of qualified majority voting in the Council;
- an active role for the European Parliament;
- uniform interpretation of Community law by the Court of Justice.

It contrasts with the intergovernmental method of operation used in the second and third pillars, which proceeds from an intergovernmental logic of cooperation and has the following salient features:
the Commission's right of initiative is shared with the Member States or confined to specific areas of activity;

- the Council generally acts unanimously;
- the European Parliament has a purely consultative role;
- the Court of Justice plays only a minor role. (http://europa.eu.int/scadplus/leg/en/cig/g4000.htm, 10.08.2004)

Treaty envisaged different types of decision-making, different processes of integration for each of the pillars.

One of the most significant examples that indicate the objective differences between the Member States with the ToM is the EMU with the introduction of convergence criteria in this policy field. [9] The third phase of the EMU was envisaged by the ToM with the condition of meeting the convergence criteria to be a part of single currency. Yet not all the Member States might join the third phase at the same time, although they adopted the ultimate goals of the EMU, besides the ones who opt-out from the third phase.[10] The EMU, therefore, created a differentiation among the Member States. This difference can be perceived as tripartite. The Member States who are able and willing to join, the other ones that are willing but unable since they cannot fulfil the convergence criteria and the ones who are not willing although they are able to.

[9] To ensure that the sustainable convergence required for the achievement of economic and monetary union (EMU) comes about, the Treaty sets five convergence criteria which must be met by each Member State before it can take part in the third stage of EMU. The criteria are:

- the ratio of government deficit to gross domestic product must not exceed 3%;
- the ratio of government debt to gross domestic product must not exceed 60%;
- there must be a sustainable degree of price stability and an average inflation rate, observed
- over a period of one year before the examination, which does not exceed by more than one and a half percentage points that of the three best performing Member States in terms of price stability;
- there must be a long-term nominal interest rate which does not exceed by more than two percentage points that of the three best performing Member States in terms of price stability;
- the normal fluctuation margins provided for by the exchange-rate mechanism on the European Monetary system must have been respected without severe tensions for at least the last two years before the examination. (http://europa.eu.int/scadplus/leg/en/cig/g4000.htm)

[10] The Treaty provides that EMU is to be achieved in three stages:

- First stage (1 July 1990 to 31 December 1993): free movement of capital between Member States, closer coordination of economic policies and closer cooperation between central banks;
- Second stage (1 January 1994 to 31 December 1998): convergence of the economic and monetary policies of the Member States (to ensure stability of prices and sound public
- finances) and the creation of the European Monetary Institute (EMI) and, in 1998, of the European Central Bank (ECB);
- Third stage (from 1 January 1999): irrevocable fixing of exchange rates and introduction of the single currency on the foreign-exchange markets and for electronic payments, followed by the introduction of euro notes and coins from 1 January 2002.

(http://europa.eu.int/scadplus/leg/en/cig/g4000.htm)

There are some criticisms on the EMU that with Maastricht a peculiarity among the Member States have been created. According to La Serre and Wallace system did not form a partnership easily accessible to latecomers since the willing but unable states would have difficulties to be a part of the system in the future (La Serre and Wallace 1997: 13). Yet this criticism can be met by the joining of Greece, who was not able to meet the convergence criteria when the third phase was initiated in 1999, in 2001 two years after the initial 11 Member States. Therefore, EMU constitutes the example of the accession of the laggards in to closer cooperation (Laursen 2002). However one has to add also the risk of the creation of pre-ins and outs. The door is always left open to the latecomers but further arrangements among the pre-ins might be developed, thus it might be more difficult for the pre-outs to meet all the conditions. Yet, La Serre and Wallace stated that this discrimination is balanced by the fact that EMU is firmly set within the treaty framework and that all Member States were involved in the initial discussion, take part in subsequent discussion, and are kept abreast of developing the monetary *acquis communautaire* (La Serre and Wallace 97: 12).

According to Ehlermann the provisions on EMU are the first case where transitional provisions has led to diminished participation in Community decision-making procedures (Ehlermann 1997: 4). Therefore, it is also important for the considerations on the pattern for the future EU enlargements. EMU can be seen as an example for the institutionalisation of flexibility before the formal institutionalisation with the Treaty of Amsterdam.

ToM not only led to a differentiated integration in the field of EMU, but also introduced the opt-out formula. The 'opt-out mechanism' can be defined as *"a potentially permanent exemption from a Treaty provision, as opposed to a temporary derogation"* (EU dictionary, http://www.euro-know.org/dictionary). The examples of opt-out formula were seen in the field of EMU with the UK and Danish opt-outs with the Protocols No 11 and 12 respectively.

In the field of social policy, as well, the UK enjoyed this formula with the Protocol 14. This policy area signifies the difficulty of establishing a common policy across

the Community due to the maintenance of autonomous national actions. The successive enlargements with different social levels of the coming countries also increased the differences within the Community. The ToM signalled the recognition of legalized differentiation (Wallace and Wallace: 1995: 78). Due to the reservations of the UK regarding the social policy a separate protocol, Protocol No 11, was adopted by all Member States but the UK which would operate within the institutional framework of the Union. The exceptional arrangements according to Ehlermann indicate departure from traditional orthodoxy, and this was the price to be paid for the advance in integration that could not otherwise have been attained (Ehlermann 1997: 4).[11]

The introduction of opt-out formulae by the ToM, the Danish singularity, range of opt-outs for the UK aimed at the prevention of deadlock in the integration process and the adoption of the ToM unanimously. The peculiarities among the Member States became an obstacle in exercising common actions. Yet the opt-out mechanism carries also a risk that the Member States that were given opt-outs would demand more exceptions on other issues that might result in the fragmentation of the union. Exceptional provisions should be acceptable if their effects are essentially confined to the dissident Member State, without fundamentally disturbing the Community system (La Serre and Wallace 1997: 12).

As a conclusion before the formalisation of the clauses on flexible integration by the Treaty of Amsterdam, the Community has experienced different types of differentiated integration within the scope of the Treaties. The increasing diversity within the Union has made the flexible integration inevitable. It has been a recipe for reconciling the divengent approches of Member States with the need for further deepening.

[11] The opt-outs given to the UK was probably with the hope that the elections in Britain, the changed government would abandon the special provisions which indeed happened.

2.2.2 Examples of Differentiated Integration that Fall Outside of the Scope of the EU

The differences among the Member States have resulted in some other examples of differentiated integration, not within the scope of the Treaties, but outside the framework of the Union. La Serre and Wallace name this type of differentiated integration as “parallel cooperation”. An example of flexible integration among some Member States outside the EU/EC even in the early years can be given as the closer cooperation in the Benelux framework (Art. 233 EEC). Initiatives regarding joint research projects, such as Airbus, ESA, JET and French Eureka project were also undertaken outside the EC/EU framework (Ehlermann 1997: 3). Before Maastricht the original EMS also constitutes an example of flexible integration outside the EU.

ToM with the introduction of new pillars also signified the different approaches to integration in terms of different policy areas. For examples, the second and third pillars, CFSP, JHA, more illustrate an intergovernmental character.

In the field of defence probably on the basis of the intergovernmentalist character in the EU, arrangements among certain Member States haven taken place outside the EU. The WEU, Eurocorps, Eurogroup, Eurofor and Euromafor can be given as the various forms of cooperation in areas of security and defence policy[12] (Ehlermann 1997: 3). The field of security and defence can be perceived as a new policy area for the Community although in the past there was some failing attempts to extend the Union into the field of security, such as the failed attempt of European Defence Community in 1950s, or the Fouchet Plan of the 1960s. The reason why cooperation among some of the Member States emerged can be explained by the end of Cold War. The reduced American dominance in Europe resulted in a search for new role for the EU in the field of defence and security (La Serre and Wallace 1997: 14). The German unification and security vacuum in the Central and Eastern Europe also resulted in attempts to incorporate the security issues within the EU.

[12] It is important to note that the status of the WEU has changed with the Treaty of Amsterdam. The Treaty of Amsterdam made the WEU an "integral part of the development of the Union" by giving it an operational capability in the field of defence. Therefore, it is not an example of differentiated integration in the field of security that falls outside scope of the Treaties.

In the third pillar created by the ToM, the JHA, it is possible to see examples of differentiated integration. The Schengen Agreement, prior to incorporation into ToA, is an example of extra-EU cooperation among some Member States of the EU together with some other non-EU countries. [13]

La Serre and Wallace points out that Schengen did not result from a failed attempt within the EU. It was believed by its originators that cooperation among the states outside of the EU, as a form of parallel cooperation would better serve the interests in terms of geography and policy priorities of the members of Schengen (La Serre and Wallace 1997: 15).

Thus, for these issues which do not fall within the competence of the EC, the possibility of closer cooperation among some Member States, but outside of the framework of the Community was made possible, or at least it was not prohibited. Yet some of the issues which had not fall under the competence of the Union in 1980s, for example free movement of people, now fall under the competence of the Community with Schengen Agreement. Increase in the competences of the Union results in a more limited area for closer cooperation outside the Treaty framework.

In this part, the examples of differentiated integration either within the scope of the Community or outside it were illustrated. The existence of a practice on differentiated integration points out that the concept of flexible integration has been a part of the Community system. However, the discussion on the institutionalisation of flexible integration ripened over time. Therefore, to understand the issue better it is vital to look into the historical and political debate on flexible integration.

[13] The Schengen Agreement was signed in 1985 by the Benelux countries, France and Germany to remove gradually their common frontier controls and introduce freedom of movement for all individuals who were nationals of the signatory Member States, other Member States or third countries.
The Schengen Convention was signed by the same five States on 19 June 1990 but did not enter into force until 1995. It lays down the arrangements and guarantees for implementing freedom of movement. Schengen has gradually expanded: Italy signed up in 1990, Spain and Portugal in 1991, Greece in 1992, Austria in 1995 and Denmark, Finland and Sweden in 1996. Iceland and Norway are also parties to the Convention. (http://europa.eu.int/scadplus/leg/en/cig/g4000.htm)

2.3 The Political Debate on Flexible Integration

Examples given above illustrate that the practice of differentiated integration is not new. Besides the practical aspect, the political debate on the issue is also not new. Associated with some developments in Community policies, and paralleled with the increase in use of examples of flexible integration, the issue was also discussed within political and theoretical context. Yet only the debate of the 1990s has led to the institutionalisation of the mechanism within the Treaties, although there existed several examples of differentiated integration within or outside of the Community. Therefore, this section, firstly early discussions on the issue until the 1990s will be analysed. Then, the developments in 1990s associated with the discussions andd political discourse on the issue will be questioned.

2.3.1 Years Between 1970s-1990s

The roots of the debate can be traced back to 1970s. One of the earliest debates on differentiated integration emerged with the speech of Chancellor Willy Brandt to the European Movement in Paris in November 1974. He recognised the differences among the Member States in terms of economic conditions and suggested that "*the Community would be strengthened if the objectively stronger countries were to be more closely integrated first and the others followed at a later stage*" (in Stubb 1998: 38). Therefore, he proposed a "graduated integration" which would have a centripetal effect that would drive the process forward and pull the weaker countries along into the core group (Stubb 1998: 38).

Leo Tindemans with his report, the Tindemans Report of December 1975, also contributed to the flexibility debate. In the report he stated that to avoid Europe 'crumbling away' the states which are able to progress have "a duty to forge ahead (in Herolf 1998a: 5; Brown 2002: 6). There are differences in terms of the levels of economy and financial situation among the Member States. To deepen integration, those states, which cannot progress, should allow others to forge ahead. The opportunity for the ones to catch up later is also envisaged. Therefore, according to Tindemans an à la carte type of integration was not an option, each country should be bound by final common objectives which would be reached by all in due course

(Stubb 1998: 39; Brown 2002: 6). One can also add that flexibility is not viewed as an alternative to deeper integration of all the Member States but as a means to achieve that goal (Herolf 1998a: 6).

There have been examples of differentiated integration since the establishment of the Community. Yet the political debate on flexibility, discussions on the issue emerged by the speech of Brandt and Tindemans Report in mid 1970s. Developments within the Union triggered the debate. Stubb explains the reason behind the materialization of the debate with the disappointment in full implementation of the EMU in the 1980s as it was envisaged, the renegotiations of some aspects of membership of Britain and possible extension of exceptional arrangements and also the debate on the revival of WEU which would have left Ireland and Denmark outside of the organisation (Stubb 1998: 39).

This early debate was followed by the speech of Ralf Dahrendorf of Jean Monnet lecture in November 1979. In his speech he argued that the rigidity of Community policy-making was an obstacle to further European integration. Thus he called for an à la carte Europe which he defines as "*common policies where there are common interests without any constraints on those who cannot at a given point of time, join them'*"" (Dahrendorf 1979: 21-22 quoted in Stubb 1998: 40). He suggested that there should be a short common list of political decisions, but at the same time Member States should be free to choose areas of cooperation other than this short list.[14]

Speech of Dahrendorf coincides with two major events concerning the Community: the second wave of enlargement and the European Monetary System. Discussion on the Greek accession was underway already and the membership agreement had signed in 1979 although Greece became a member in 1981. There were fears on the economic implication of enlargement if one considers that Portugal and Spain also applied for membership. The second event which coincided with the speech was the

[14] As it was mentioned before in the conceptualisation part, the phrase à la carte was coined by Dahrendorf. His understanding from the phrase is quite different than what scholars or politicians in general understand in 1990s. The term was also recalled my Major but with different connotations referring to a pick-and-choose model.

establishment of EMS. It was a differentiated monetary system planted within the Union but not with the joining of all members (Stubb 1998: 41).

By the mid-1980s the issue of flexibility became an issue of academic discussions. Besides the authors who started to examine the concepts related to flexibility, implications of flexibility on certain Community policies, the legal aspect of the issue and the role of particular Member States in relation to flexibility, the official papers within the Union, and in some Member States started to pronounce the possibility of flexibility, or its different forms.[15] However, in the second half of the 1980s the debate did not attract much attention despite all the events that would normally have prompted the debate. The Schengen Agreement of 1985, the issue of WEU, and the accession of Spain and Portugal were resulted in flexibility in practice, but no concrete debate in literature. This lack of correspondence between the theory and practice of flexible integration is to be questioned. The reasons were explained by Stubb as the effects of British membership, the postponing of the monetary union debate by the establishment of Single Market. And another enlargement was not expected anymore (Stubb 1998: 45). Therefore, there is no deadlock in either widening or deepening. The issue was back on the agenda in 1990s.

2.3.2 The Debate in 1990s

In 1990s, however, the debate which led to the formalisation of the mechanism, came to surface. In 1990s there has been a great change not only for the European Union but also for the world. End of the Cold War had a significant impact on world politics. The collapse of the Soviet Union, the unification of Germany and the diminished interest of United States in Europe had a general effect on the issue of flexibility indirectly, along with more specific reasons for why the debate on flexible integration arouse in 1990s. Wallace (2000) and Stubb (2000b) in their work emphasize these reasons under several headings.

[15] For detailed information see Stubb 1998: 43-44.

The more specific reasons can be explained under certain policy areas. The Maastricht Treaty in terms of creating the pillared structure of the Union signified a turning point for the resurgence of the flexibility literature. As Wallaces point out, the negotiations on the EMU, the CFSP and the JHA should not be separated from the earlier debates of the EMS, the WEU and the Schengen agreements (Wallace and Wallace 1995: 75). However, by introducing functional flexibility into some major policy areas the new Treaty accelerated the debate (Stubb 1998: 46).

The EMU; *'the first flagship project"* of the EU in Wallaces' terms has deliberately envisaged the participation of only some of the EU members (Wallace 2000: 177) and was one of the specific reasons of change, to which also Stubb referred. The reason why flexibility was envisaged for the EMU was to facilitate the legislation among Member States which can fulfil the convergence criteria (Stubb 2000: 147). The reason for change in terms of security issues according to Wallace was due to the expectation of pursuing two different projects of integration at the same time, the political economy project and also the defence and security project (Wallace 2000: 177). In terms of the third pillar, issues of free movement of persons and border controls were the factors for change. Yet according to Stubb, particularly in the second and third pillar, the pronunciation of the possibility of flexibility was due to the fact that differences among Member States became more visible (Stubb 2000b: 147). Some of the Member States wanted to by-pass the reluctant Member States with the fear that otherwise the unwilling ones can block the decisions regarding all policy areas. This was one of the main reasons for the issue to be put on the agenda (Stubb 2000b: 147).

In addition to reasons mentioned above, enlargement has always been a reason for change for the Union. The previous successive enlargements have already complicated the decision-making procedure. Transitional agreements were signed with the acceding countries. The EFTA enlargement of 1995 raised some institutional questions regarding the weighting of votes in the Council. Although no fundamental change was envisaged in terms of institutional structure, an agreement –

Ioannina Compromise[16]- was introduced to ease the concerns of some of the larger Member States that fear from the erosion of their power in the Council derive from the increased possibility of blocking decisions.

The Copenhagen European Council of June 1993, however, was the turning point for the future of the Union. Opening the way for another wave of enlargement, which is different than the previous ones in terms of both quality and quantity, resulted in the question whether the existing treaties can manage this round of enlargement with the existing institutional framework or not. The negative response to the question also led the way to deeper discussions on differentiated integration.

Su perceives enlargement as the main reason for the institutionalisation of flexible integration since the early 1990s. Institutionalisation of flexible integration was a tool against the cooperation outside the EU structures. Moreover, in a more and more heterogeneous EU, flexibility has become more important (Su 15). The eastern enlargement also increased doubts on the community method of integration. Efficiency was no more associated with uniform integration through centralised regulations, but with coordination through more limited or different modes of regulation (Su 13).

The policy debate on the issue of flexibility in 1990s was initiated by a paper. The Lamers-Schäuble initiative has politicised and dynamized the debate on differentiation within the EU. The Publication of the German Christian Democratic Union (CDU)/ Christian Social Union (CSU) parliamentary group's paper by Karl Lamers and Wolfgang Schäuble entitled "Reflections on European Policy", on 1 September 1994, revitalised the debate on differentiated integration. The main

[16] The Ioannina compromise takes its name from an informal meeting of foreign ministers in the Greek city of Ioannina on 29 March 1994. Among the decisions taken at the meeting was a Council decision concerning the specific question of qualified majority voting in an enlarged 16-member Community. The decision was later adjusted in the light of Norway's decision not to join. The resulting compromise lays down that if members of the Council representing between 23 votes (the old blocking minority threshold) and 26 votes (the new threshold) express their intention of opposing the taking of a decision by the Council by qualified majority, the Council will do all within its power, within a reasonable space of time, to reach a satisfactory solution that can be adopted by at least 65 votes out of 87. (http://europa.eu.int/scadplus/leg/en/cig/g4000.htm)

argument was the creation of a "hard core" consisting of France, Germany and Benelux countries in which France and Germany would be the joint leader of the hard core. A flexible approach is necessary in order to enable those Member States which wish to pursue closer cooperation and integration without being prevented from doing so by other member states' vetoes (Shauble and Lamers 1994 in Stubb 1998: 103). The EMU and closer defence cooperation were pronounced as the core of an economic and political union. Therefore, the paper was addressed directly to the states which were reluctant to join either EMU or defence cooperation (Stubb 1998: 103). [17]

Their proposal originated the discussion and formed the basis of subsequent German thinking in collaboration with French Government (Gillespie 1997: 50). The proposal, however, was subject to many criticisms both in the political and academic arena. According to Dehousse they gave the impression that they sought to create a sort of privileged circle, whose members would be hand-picked on the basis of criteria -both arbitrary and obscure- which would be called upon to play a leadership role in the Community (Dehousse 1995: 110). In particular the pronunciation of the names of the countries that are supposed to be in the inner core caused reaction. There was an up date document after the criticisms that the terms of hard core and federalism were removed (Esposito 2001: 100-101).

One of the first reactions to the proposal came from the United Kingdom, from the Prime Minister John Major one week later at University of Leiden. His speech was reflecting the traditional British approach by following Thatcharite type of integration as the model. Therefore, to understand better the British approach it is better to examine the approach of Thatcher, before moving to the speech of Major.

In her speech delivered in Bruges on 20 September 1988, Britain & Europe, Margaret Thatcher stated that the best way to build a successful European community is an active cooperation between the sovereign states. She indicated her intergovernmentalist tendency by saying that "to try to suppress nationhood and

[17] For details of the paper Stubb 1998, pp. 102-105.

concentrate power at the centre of a European conglomerate would be highly damaging and would jeopardise the objectives we seek to achieve". She also added that "Europe will be stronger precisely because it has France as France, Spain as Spain, Britain as Britain, each with its own customs, traditions and identity. It would be folly to try to fit them into some sort of identikit European personality" (Thatcher 1998).

Major's speech follows the traditional British approach of à la carte method of integration. At his speech on 7 September 1994 Major reflected his view which is opposed to Germans by the words;

> So I see real danger, in talk of a "hard core", inner and outer circles, a two-tier Europe. I recoil from ideas for a union in which some would be more equal than others. There is not, and should never be, an exclusive hard core either of countries or of policies. …The European Union involves a wide range of common policies and areas of close co-operation. No Member States should lay claim to a privileged status on the basis of their participation in some of them (Major 1994).

According to British approach the only commitment is the single market and the system of exemptions and opt-outs obtained by Denmark and the United Kingdom are to be generalized. The à la carte type of integration indicated a menu from which the Member States would be able to choose the policy area to integrate. One can signify the reflections of domestic politics on the issue of European Union. At the time there was a parallel debate of political identity of UK after the end of the Cold War with the Conservative Party in power (Gillespie 1997: 51).

France also contributed to the debate with the proposal of the French Prime Minister Edouard Balladur in his article published in Le Monde in November 1994. The French proposal was close to the German one but with some differences. The proposal was the "system of concentric circles" that consists of three circles, namely the inner circle, middle circle and the outer circle. It resembles the German proposal with the acceptance of a central homogenous core, countries at the centre of the Union, which consists of the willing Member States that go further in terms of integration, regarding issues of EMU, security and defence, political

affairs…(Gillespie 1997: 51). This circle is surrounded by the countries with slow pace and the third layer belongs to the prospective members.

Balladur emphasized a natural diversity, yet an institutionalised solidarity among the Member States. The multi-speed Europe was in the spirit of Maastricht reforms concerning monetary and social matters (Miller 2000: 33). Yet although it resembles the German proposal with the idea of a hard core of countries according to some, the proposal at the same time aimed at reinforcing the intergovernmental character (Esposito 2001: 102).

The debate in the 1990s among the French, German and British politicians indicated how completely different models for the future of Europe can be pursued using different concepts of differentiation. Lamers- Schäuble and Balladur were stipulating a future architecture whereas Major completely ignores architectonic structures (Ehlermann 1997: 5). Therefore, the flexibility debate was shaped by the speeches of the Prime Ministers of larger Member States in the Union in 1994. These speeches illustrate how the issue was tackled in political circles. It should be emphasized that this political debate contributed to the inclusion of the issue into the agenda of the IGC 1996-1997.

There are two futher initiatives of the Member States, during the preparatory work of the IGC 1996-1997. The joint letter of Chancellor Kohl and President Chirac of 6 December 1995 was one of them. In the letter it was emphasized that the treaty ought to incorporate a general clause opening up the possibility for states who are able and willing to do so, to develop intensified cooperation, albeit maintaining the Union's single institutional framework (in Ehlermann 1997:6). Second initiative was the joint letter of the two countries Foreign ministers, Kinkel and de Charette on 17 October 1995. The letter pointed out the intensified cooperation in the light of further deepening of European integration alongside introducing specific proposals for a new article (in Ehlermann 1997: 6).

2.4 Conclusion

This chapter has shown that differentiated integration is not new to the European Union and that there are examples of flexibility in the history of the EU. The use of the mechanism has been both related to widening and deepening. Derogation arrangements associated with successive enlargement processes constitute early examples of differentiated integration. Incompatible policy areas in which Member States hesitant to get involved resulted in potential deadlocks. These required the use of differentiated integration mechanisms as a tool even before the formalisation of the mechanism within the treaty framework.

The use of this mechanism has been accompanied by academic and political debates on the issue. A wide range of concepts has been used to refer to different models of differentiated integration. The sheer variety of concepts has resulted in their confusion. These academic debates and ongoing practice of differentiated integration in EU history are also associated with political discussions; and have reflected different national approaches towards European integration process. The discussions of the mid 90s led to the inclusion of the flexibility on the agenda of the IGC 1996.

CHAPTER 3:

THE INTERGOVERNMENTAL CONFERENCE OF 1996 AND THE TREATY OF AMSTERDAM

Until the late 1990s, the practice of flexibility was not included into the Treaties as an institutional way of managing integration. The issue was included on to the agenda of the IGC 1996 and resulted in the institutionalisation of the flexible integration mechanism of "closer cooperation". This was a basic principle within the EU, for the first time, with the Treaty of Amsterdam. Therefore, the Treaty, which was officially signed in October 1997 and entered into force in 1999, constitutes a turning point.

This chapter will examine preparations for the IGC1996, its negotiation process and finally the outcome. At every stage, Member States' views which had a crucial impact on the issue, will also be given.

The first part of this chapter will be the agenda-setting period. Major events which led to the inclusion of the issue onto the agenda will be discussed. Within this framework, the preparatory work before the convening of the IGC 1996 will also be discussed. In addition, this part will illustrate the views of the institutions of the Union and some Member States at the beginning of the process; thereby serving as an important basis to gain insight into the evolution of the mechanism.

The second part will focus on flexibility within the treaty negotiations. Therefore, the success of the provisions should be considered in light of the negotiation process and the development of the issue through the negotiation process is outlined. National

positions will be organised by groups in order to understand the outcome of the negotiations in the third part of the chapter.

Next, the provisions will be analysed. The Treaty of Amsterdam introduced three types of flexibility; the enabling clauses, case-by-case flexibility and pre-determined w3flexibility. All of these forms of flexible integration will be observed in detail.

Lastly, a broader interpretation of the outcome will be offered. Criticisms raised by the scholars regarding the process and the outcome of the process including a critical analysis of the provisions will be given.

3.1 Agenda Setting and the Preparatory Work

The mandate of the IGC was defined with the Maastricht Treaty of 1991. The TEU envisaged the review of the Treaty in 1996 and set the scope of the new IGC under Article N.2 as to;

> Examine those provisions of this Treaty for which revision is provided… considering to what extent the policies and forms of co-operation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.

A new IGC, therefore was already provided by the Maastricht Treaty. According to Edwards and Philippart the primary purpose was to review implementation of ToM and to tidy up some of elements of the final package deal agreed by Heads of State and Governments at Maastricht (Edwards and Philippart 1997: 7). In particular, there was one issue that shaped the scope of the IGC 1996-1997, the process of enlargement. There were other issues on the agenda as well. However, the reason for why enlargement is mentioned here in particular is the close link between enlargement and flexible integration.

Enlargement has become one of the topical issues on the agenda of the Union in the early 1990s. The Copenhagen European Council of 21-22 of June 1993 set the criteria, both economic and political, which should be fulfilled by the candidate

countries for their accession to the Union. Yet there was another condition for the realisation of the accession of the new members, which was related to the Union itself. In the Presidency Conclusion it was stated that "the Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries" (European Council: 1993a). Therefore, the overall understanding was that institutional and policy reform was required for enlargement.

The need for further institutional reform was apparent even during the time of 1995 enlargement. The Ionnina Compromise of 1994 was adopted to preserve the balance in the Council through modified weighted votes. Considering the number of the new candidates for the 2004 enlargement, it was obvious that enlargement poses a challenge for institutional reform. In a larger Union with 27 or 28 members, there exists the risk of a deadlock in the decision-making procedure. With the increase in the number of smaller Member States in the Union, the critical political balance between the larger and the smaller Member States would also be in threat.

Taking into account the challenge of enlargement in terms of institutional issues, issues like the number of the Commissioners, the weighting of the votes in the Council, the numbers of the members of the Parliaments, extension of qualified majority voting into new issues were the most popular questions. Yet there was another issue, which was also introduced as a subject for the agenda, the inclusion of flexibility.

Concerning the issue of enlargement, the debate of flexibility was particularly important. Flexibility could be perceived as a magical solution to the challenges of enlargement as it provides a degree of integration within a larger Union while preserving the existing framework of integration. According to some, the issue has a decisive importance for the future development of the EU. La Serre and Wallace ask the question whether flexible integration is the best recipe for reconciling the need to maintain an integration dynamic with the heterogeneity that further enlargement can only increase (La Serre and Wallace 1997: 33)? Stubb also adds the EMU abd the awkward Member States in addition to enlargement as the hidden agendas of

flexibility negotiations (Stubb 200a: 166). Therefore, attaching more importance to the issue of flexibility by taking into account the forthcoming enlargement, the future of the Union and the unwilling Member States, the discussions on the inclusion of differentiated integration into the agenda of the IGC has begun.

In shaping the scope of the agenda, the successive European Councils played an important role. Thus the Maastricht agenda was widened by the successive Councils. For example the Brussels European Council of 10-11 December 1993 asked the IGC to consider "...any measures deemed necessary to facilitate the work of the institutions and guarantee their effective operation" (European Council: 1993b). The Corfu European Council of 24-25 June 1994 also contributed to the agenda setting by repeating the Brussels European Council's conclusion in terms of taking necessary measures for enlargement. At the summit, it was also decided to create a Reflection Group, which would be consisted of representatives from each Member State, in addition to two representatives from the EP and one from the European Commission to manage, protect and prepare IGC's agenda (European Council: 1994: 15). The Group, which is also known as the "Westendorp Group", was headed by Carlos Westendorp from Spain. The Group began its works in June 1995.

Until that time, including the Corfu Eurpean Council, there was no direct reference to flexibility issue. However, without pronouncing the word "flexibility" or "closer cooperation", the Council asked the Reflection Group to examine "measures deemed necessary to facilitate the work of institutions and guarantee their effective operation in the perspective of enlargement" (European Council 1994: 16). Therefore, at the beginning of the preparations for the IGC, the issue of flexibility was not one of the issues on the agenda.

The political debate that was undertaken at the domestic level has also influenced the agenda of the IGC. At this point, it should be noted that, the Lamers-Schäuble Paper of September 1994, which was mentioned in the previous chapter, coincides with the Corfu European Council of 24-25 June. With the Lamers-Schäuble Paper an extensive debate on flexible integration has started. Ehlermann stated that Lamers-Schäuble has an indirect effect on Westendorp Group (Ehlermann 1997: 5).

It is essential to remark two official papers submitted to the Reflection Group that pronounced the term, namely the Commission's Report of 1995 and the EP's Report of 1995. In the Report of the Commission, it was stated that further enlargement would force the Union 'to look more closely at the possibility of different speeds of integration" (Commission's Report 1995: 6). But it also pointed out the necessity of preserving the single institutional framework. The EP, while considering the possibility of differentiated integration, emphasized that this kind of integration should not undermine the principle of equality of all states and the citizens of the Union, nor it should undermine the single institutional framework, the *acquis communautaire* or the principles of solidarity and social cohesion throughout the European Union (EP's Report 1995: 8). Therefore, the two Reports both opposed to an à la carte type of differentiated integration. At the time there was no reference to the issue in the Reports of the Council.

There were also individual contributions of some Member States. The Dutch Government in 1994 provided the first set of conditions for flexibility introduced by a Member State (Stubb 2000: 159). The Dutch in particular, pointed out that the mechanism should be temporary. The second contribution was a White Paper issued by Spain in March 1995. It also set the conditions as 'last-resort' status; openness to all; the existence of accompanying measures to strengthen global coherence and ensure the convergence of those lagging behind; preservation of the entire *acquis communautaire*; retention of the single institutional framework; and compatibility with political stability in Europe (http://europa.eu.int/en/agenda/igc-home/ms-doc/state-es/discussn.html).

The Reflection Group, which was set up by the Messina European Council of 2 June 1995, started to work on its report and the Report was submitted to European Council of Madrid in December 1995. The Group in its Report discussed the issue under the heading "Flexibility, its rationale and its limits" (Reflection Group 1995). The Group set the following conditions for the mechanism:

- flexibility should be allowed only when it serves the Union's objectives and if all other solutions have been ruled out and on a case-by-case basis;

- differences in the degree of integration should be temporary;
- no-one who so desires and fulfils the necessary conditions previously adopted by all can be excluded from full participation in a given action or common policy;
- provision should be made for ad hoc measures to assist those who want to take part in a given action or policy but are temporarily unable to do so;
- when allowing flexibility, necessary adjustments have to be made to maintain the "acquis", and a common basis should be preserved to prevent any sort of retreat from common principles and objectives;
- a single institutional framework has to be respected, irrespective of the structure of the Treaty (Reflection Group 1995).

The emphasis was put on the maintenance of the *acquis communautaire* and the consolidation of the single institutional framework. The relationship between enlargement and flexibility was also indicated. Flexibility was considered on a case-by-case basis and as a way of managing diversity without jeopardizing the *acquis communautaire* and the common objectives. The Group rejected flexibility for the first pillar, but enviaged it for the second and the third pillars. The Group explicitly stated that they are against any formula which could lead to an à la carte Europe (Reflection Group 1995). With the publication of the Report it was clear that the institutionalisation of flexibility would be a permanent part of the IGC's agenda (Stubb 2000a: 160).

Before the official start of the IGC there are two other common initiatives by Germany and France, which also affected the debate on the issue. According to the first initiative, the Kohl-Chirac letter of 7 December 1995 which was issued at a Franco-German Summit in Baden-Baden, the "*Treaty ought to incorporate a general clause opening the possibility for the States able and willing to do so to develop intensified cooperation albeit maintaining the Union's unitary institutional framework*." (quoted in Ehlermann 1997: 6). Therefore, the underlying idea was that willing and able states should not be prevented from closer cooperation so long as that cooperation remained within the established institutional framework, and was open to all members of the EU. The second paper was released on 27 February 1996, this time by the Foreign ministers of the two countries, Klaus Kinkel and Herve de

Charette in a seminar held in Freiburg. This document stated that a possibility for opt-outs should be linked to the new proposed flexibility clause, so as to prevent any Member State being forced into a particular area of cooperation (Ehlermann 1997:6).

From December 1995 to the opening of the IGC in March 1996, there had been four main points that are worth to be mentioned. First, in March 1996, it was clear that the issue would be on the agenda as each of the member states mentioned the subject in their own reports. All accpeted the institutionalisation of flexibility. Second, à la carte Europe as a form of flexible integration was rejected by all Member States and the institutions of the Union. Third, a group of hesitant Member States began to emerge, such as Sweden, Britain, Greece, Denmark and Portugal. And lastly, although many Member States seemed to support the notion of flexibility, almost all have suggested "tight strait jackets" for its application (Stubb 2000a: 162-163). Therefore, one should note the delicate balance between the acceptance of flexiblity and its conditional application.

3.2 The IGC and the Treaty Negotiations

The IGC formally opened on 29 March 1996 during the Italian presidency, after the preparatory work was finished. Turin European Council of 29 March 1996 asked the IGC to examine the institutionalisation of the mechanism, whether and how to introduce rules either of a general nature or in specific areas in order to enable a certain number of Member States to develop a strengthened cooperation (European Council 1996a: 5). Following chronologically, the next summit, the Florence European Council of 21-22 June 1996 asked the IGC to continue to examine the notion of flexibility (European Council 1996b).

By this time, according to Stubb a general approach was rather abstract. Under the Italian Presidency only general questions were asked rather than finding answers. The position papers of the Member States also did not provide answers to the questions. This is not surprising, not only because Member States did not want to

reveal their positions, but also because they were not sure what their actual positions were (Stubb 2000a: 164).

The first draft article on flexibility was introduced by the Irish Presidency on 25 September 1996 (CONF 3914). The link between enlargement and flexibility was again pointed out and the document strongly reflected the assumption that flexibility was needed because of enlargement (Stubb 1997: 187). The debate on the draft article on 30th September indicated that the issue is one of the most difficult and most important issues for the future of the Union issues on the agenda. Most of the Member States held the idea that flexibility should be subject only to the second and the third pillar but not the first one (Stubb 2000a: 164).

Meanwhile the third common position of Germany and France, the joint letter of the two foreign ministers of 17 October 1996 was issued. The letter advocated that the mechanism should enable the continuation of the process of European integration and be directed only forward, even if initially only part of the Member States were prepared to go ahead (Ehlermann 1997: 6). According to Stubb, the letter indicates that both countries see the mechanism as a way to further integration (Stubb 2000a: 165). The letter also included specific proposal for a new article to be incorporated into the Treaty alongside the three specific articles laying down the details for three pillars.

As it can be seen with the Lamers-Shäuble paper and the joint letters, Germany was a prominent advocator of the instituonalisation of the flexible integration from the beginning. However, according to Ehlermann, even for Germany the issue of flexible integration was not "any patent recipe for overcoming the EU's institutional difficulties" since the replacement of unanimity voting with QMV was more an issue of interest (Ehlermann 1997: 6).

During the IGC there were concrete developments on the issue of flexibility. The Dublin Council of 13-14 December 1996 pointed out the progress made in examining the proposals for Treaty provisions which would permit more flexible approaches leading to enhanced cooperation in appropriate areas, subject to agreed

conditions. This issue is of great importance and the European Council asked the Conference to devote particular attention to it (European Council 1996c). However, the "General Outline for a Draft Revision of the Treaties" prepared by the Irish Presidency which was submitted to the Dublin Council (CONF 2500) did not propose a draft artcile on flexibility. Rather than formulating a draft article on the issue of flexibility, common views were laid down such as flexibility should not be an alternative to the Community type of decision-making, the conditions should be defined precisely, the mechanism should be open to all members, the rights of the non-participants should be respected (Stubb 1997: 206; Stubb 2000a: 165-166).

The first official draft article on flexibility was issues by the Dutch Presidency on 21 March 1997 (CONF 2500 ADD1). The Addendum introduced a general clause that sets the general conditions and institutional arrangements as well as specific clauses for each Pillar. It is also important to mention that the Section V of the Addendum was entitled as "closer cooperation- 'flexibility'". According to Edwards and Philippart, instead of having a title as "differentiated integration" the heading in the Addendum was perhaps reflecting the determination of some Member States to ensure that the emphasis remained on mainly intergovernmental mechanisms (Edwards and Philippart 1997: 10).

During May and June 1997 the topic was no longer discussed. One of the reasons was the election of a pro-European government in the UK. There were expectations that the reluctant attitude of the UK towards integration would change with the new Labour government with its more coopertaive policy towards European partners. The issues of EMU and enlargement were also solved implicitly. Therefore, the pressing need for the use of flexibility was lessened (Stubb 2000a: 169). It can be observed that flexible integration has been seen as a mechanism to overcome the deadlocks in the integration process, if one may say was seen as a triumph card. When the pressing need does not exist anymore, the discussion on the issue as well lost its heat.

Three questions remained for the final Summit of 16-18 June 1997; the trigger mechanism, final say in initiating the mechanism and enabling clauses in the second pillar (Yataganas 2001). Despite the remaining questions the issue of flexibility was

discussed only for ten minutes in the IGC and the Member States reached a conclusion in contrast to the other institutional issues.[18] According to Stubb the reason was that the issue was well discussed before and during the preparatory work and negotiation process (Stubb 2000a: 170). However, according to La Serre and Wallace on the contrary, during the IGC 96 the discussion was rather on the methodology, like principles or the triggering mechanism, therefore not on the substance or about the policy domains in which it may be applied there was a conclusion (La Serre and Wallace 1997: 23). However, creation of a common base, reaching to a compromise among the Member States concerning such a thorny issue has to be evaluated as an important achievement.

3.3 Positions of Member States During the IGC 1996

Within the subheadings of preparatory work and the negotiations from time to time, Member States' views are already mentioned. The positions of Member States were pointed out either through their issued papers or through the work of the Member States, which held the Presidency at the time. But before examining the provisions in the Treaty of Amsterdam, a general idea about the stances of Member State would be helpful to understand within which framework the discussions took place.

The Member States started to question flexibility once it was put on the agenda. The thorny questions were whether flexibility should be a general principle, or, if limited, what scope it should have and what areas it should or could be applied to, and what procedures needed to be introduced for its adoption? Member States can be classified under three groupings according to their positions; under the headings of "progressive", "hesitant" and "reluctant" Member States. This categorisation also fits with the categorisation of Philippart (2001) of "able and willing", "able and

[18] During the preparatory work and negotiation process stages only the discussions regarding flexible integration are mentioned since flexible integration constitutes the subject of the chapter. There were also many other issues on the agenda of course. Flexibility issue can be considered among the institutional reform and to see the picture as a whole it is worth noting that most of the issues of institutional reform have remained unsolved until the actual Summit and even the Summit was subject to challenging discussions on most issues.

unwilling", "unable and willing". Progressive Members States are the able and willing Member States, hesitant Member States the able but unwilling Member States, and the reluctant Member States corresponds to unable Member States. The progressive Member States are Germany, France, Italy, Belgium, Luxembourg, Netherlands, Austria, Ireland, and Finland. The second category, the hesitant Member States are the ones who do not want to participate in the mechanism. These states are Britain, Sweden and Denmark. The third category, reluctant Member States consists of Greece, Portugal and Spain. Reluctant states are the ones who are in favour of limited flexibility with the fear that they would not be included in the mechanism.

Gillespie makes a differentiation between the larger and smaller Member States. This differentiation was rather obvious regarding the institutional issues. In terms of flexibility smaller Member States were in favour of a strict wording, because otherwise they fear that the mechanism could lead to disintegration. If the conditions are not strict enough to preserve the uniformity of the Union, the fear was that the mecahanism would lead to fragmentation. They put the emphasis on the maintenance of the Union's coherence to lock the larger ones into a common legal system that can constrain the application of classical power politics in Europe. The larger Member States on the other hand wish to escape from such constraints (Gillespie 1997: 53).

However, these kinds of classifications do not give the whole picture all the time. In the example of Britain, although it is one of the larger Member States, it has been one of the reluctant Member States towards the use of differentiated integration.

It could be noted that in the early stages, with the exception of some Member States which are involved in the debate deeply, almost all the Member States were vague in their positions. This was also reflected in the policy papers of the states. However, according to Stubb, this vagueness was necessary to create room for manoeuvre during the course of negotiations (Stubb 2000a: 173). Therefore, there is a clear difference in the policy papers and the actions of Member States in the negotiations. He gives the example of Sweden which advocated the enabling clauses in the

beginning, but was in favour of unanimity as the trigger for flexibility by the end (Stubb 2000a: 173). [19]

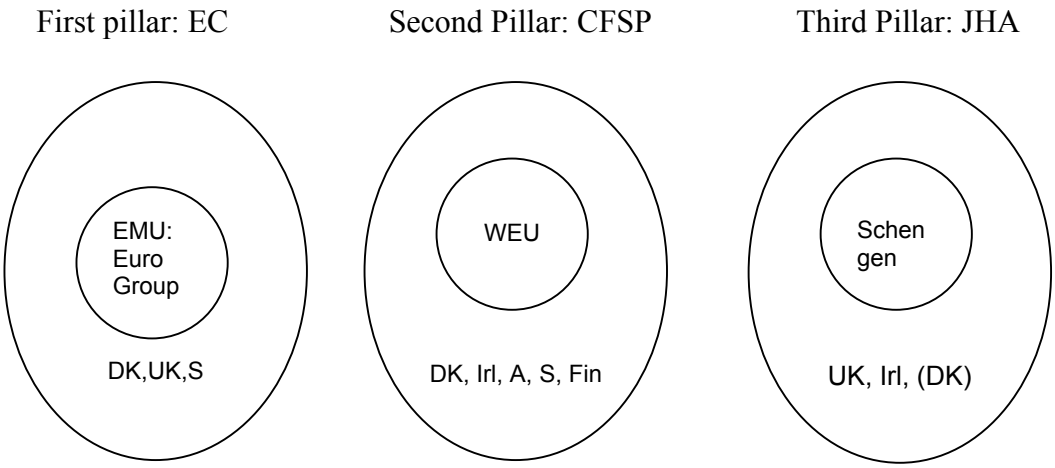

Figure 1: Different Core Groups of the EU at the Time of the Amsterdam Negotiations

Source: Laursen (2002)

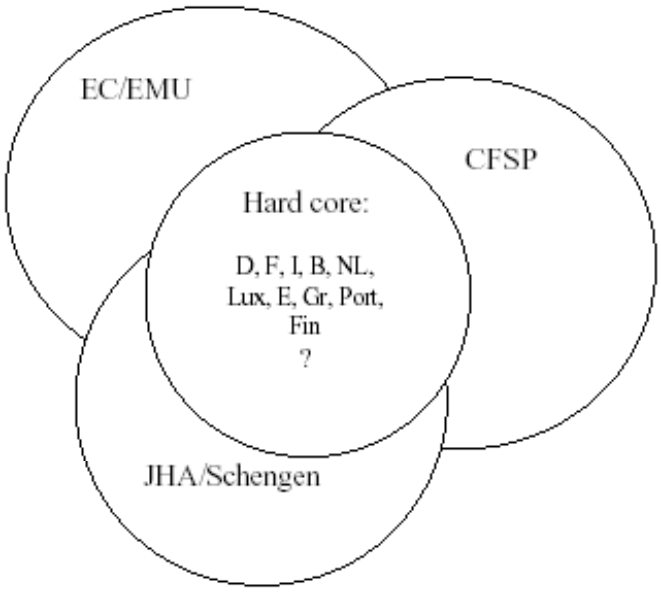

Figure 2: Towards a Hard Core?

Source: Laursen (2002)

[19] For the details of the positions of the Member States individually at every stage of the IGC 1996 see Stubb Flexible Integration and the Amsterdam Treaty, Negotiating Differentiation in the 1996-97 IGC, PhD Thesis, London: London School of Economics and Political Science.

3.4 Outcome of the Negotiation Process: The Legal Provisions

The ToA introduced three forms of flexibility. In the Treaty the term "closer cooperation" was used. The first form of closer cooperation was the "enabling clauses" which sets the general rules without referring to a particular area with the title 'provisions on closer cooperation'. Case-by-case flexibility was the second form which was an *ad hoc* mechanism and in the form of constructive abstention. The third category was pre-determined flexibility, which indicates a form of flexibility between some members within specific fields. This classification of Amsterdam clauses on flexible integration is adopted from Stubb with the idea that his approach provides a solid and clear framework to understand the provisions (1997, 1998). The three forms of flexibility coincide with the theoretical classification of Stubb as well. Enabling clauses match with the variable geometry model in the theory. Both the case-by-case and pre-determined flexibility correspond to an a la carte approach. The multi-speed form in the theoretical framework matches with the transitional clauses which does not exist in the Treaty of Amsterdam. In this part these three forms that are envisaged by the Treaty of Amsterdam will be observed briefly. [20]

3.4.1 The Enabling Clauses

Enabling clause is a method by which Member States that are both willing and able to pursue further integration are 'enabled' to do so. This is however, strictly subject to certain conditions as set out in the Treaties and it must operate within the framework of Community law. Examples of this method of flexible integration would include a general clause in the Treaty on European Union with Articles 43 to 45 TEU (ex Art.K.15) and clauses specific to the first and third pillars- the European Community and with Article 11 TEC (ex Art. 5(a)) and Justice and Home Affairs with Article 40 TEU (ex Art.K.11) respectively.

[20] For more detailed examination of the general clauses and the clauses specific to the pillars see, Ehlermann (1997), Edwards and Philippart (1997), Edwards and Philippart (1999), Gillespie (1997), Stubb (1998). For example Ehlermann (1997) in his article, different than Stubb deals also with further elements of differentiation (pp.27-29). On the other hand, Edwards and Philippart (1997) adopted a policy based classification and analyse the issue under the heading of "General Clauses", "Freedom, Security and Justice", "The Union and the Citizens", "An Effective and Coherent External Policy", "Single Market and EMU Repercussions" (pp. 26-35).

3.4.1.1 The General Clauses

The general clauses, inserted as the new title VIa as the "Provisions on Closer Cooperation", articles from 43 to 45 TEU, provide the general conditions and institutional arrangements for the enabling clauses. The aim is to preserve the basic principles of the treaties and safeguard the interest of any Member State which is outside the framework of closer cooperation. According to Edwards and Philippart closer cooperation inside the EU is not a right but a facility authorized by the Council (Edwards and Philippart 1999: 90).

Article 43 TEU (ex. Art. K.15) sets the objectives, scope and the procedures of the mechanism. The Article states that:

"Member States which intended to establish closer cooperation between themselves may make use of the institutions, procedures, and mechanism laid down by this Treaty and the Treaty establishing the EC…"

The General conditions were also set by the same article as follows:
(a) is aimed at furthering the objectives of the Union and at protecting and serving its interests;
(b) respects the principles of the said Treaties and the single institutional framework of the Union;
(c) is only used as a last resort, where the objectives of the said Treaties could not be attained by applying the relevant procedures laid down therein;
(d) concerns at least a majority of Member States;
(e) does not affect the acquis communautaire and the measures adopted under the other provisions of the said Treaties;
(f) does not affect the competences, rights, obligations and interests of those Member States which do not participate therein;
(g) is open to all Member States and allows them to become parties to the cooperation at any time, provided that they comply with the basic decision and with the decisions taken within that framework;
(h) complies with the specific additional criteria laid down in Article 5a of the Treaty establishing the European Community and Article K.12 of this Treaty, depending on

the area concerned, and is authorised by the Council in accordance with the procedures laid down therein.

These conditions are very important since they draw up the general framework for closer cooperation. The aim of the mechanism, as it can be understood from Article 43 (a) was set as furthering the objectives of the Union and at protecting and serving its interests. This confirms with the logic that closer cooperation is allowed only as a means towards faster advance and therefore not be used as an instrument of regressive manipulation (Ehlermann 1997: 9).

Article 43 (a) (b) and (e) regarding the aims, respect to the single institutional framework and the maintenance of the *acquis communautaire* according to Edwards and Philippart reflect the orthodox concerns, the preservation of key features of the Community. However conditions under (f) and (g) reflect the elements of multi-speed approach (Edwards and Philippart 1997: 13). Article 43 (f) is important to those Member States which felt that they would not participate in flexible cooperation. The condition of "openness" which is set out in Article 43(g) is fundamental to prevent the creation of a hard core that would take distance from the periphery. All Member States can join any given form of flexibility arrangement, provided that they fulfil the criteria. The last condition signifies a restrictive approach to flexibility and the unique nature of the Union. It adds additional criteria for the first and the third pillars for the preservation of the uniformity of the Union. However, these additional provisions differ from one pillar to another. This can be explained by the different structures of the pillars. The first pillar is the Community pillar with supranational features, whereas the third pillar belongs to the Union which is characterised by intergovernmental features. Therefore, the concerns in in terms of the use of flexibility differs. This is reflected to the provisions on flexible integration.

Despite the openness clause a point of criticism was raised by the two authors related to inclusion to the mechanism in a later stage. Within the provisions no criteria were set for the unable Member States to participate at a later stage when they could qualify (Edwards and Philippart 1997: 14, Edwards and Philippart 1999: 92). The on-

existence of such arrangement would cause difficulties for the practice of the mechanism in the future.

In general terms it can be argued that the conditions are highly political in their formulation. It is politically subjective to decide whether the *acquis communautaire* is or the "competences, rights, obligations and interests" of other Member States are affected. (Edwards and Philippart 1997: 15-16, Edwards and Philippart 1999: 92-93). Or regarding the last resort condition which is set out in Article 43(c), it is not easy to decide whether the objectives of the said Treaties could not be attained by applying the relevant procedures laid down (Ehlermann 1997: 10).

Besides the general conditions, institutional and financial provisions and the role of the European Parliament within the mechanism were also set respectively in Article 44 TEU (ex. Art. K.16) and in Article 45 TEU (ex. Art. K.17). Although general clauses do not contain decision-making mechanism for the enabling clauses some institutional considerations have been incorporated into article 44(1) TEU, which notes that the relevant institutional provisions of the Treaties apply to the implementation of flexibility. All Council members can take part in the deliberations, but only participating Member States have the right to take place in decision-making. Article 44(2) TEU is related to financial aspects. Expenditure for the implementation of the cooperation, other than administrative costs incurred by the institutions, will be borne by the participating Member States. All costs, however, can be borne by the Community if the Council so decides by unanimity.

The role of the Parliament, which is set by article 45 TEU, is quite limited. The article only states that the Council and the Commission should keep the Parliament regularly informed of the development of flexibility.

3.4.1.2 Specific Conditions

In addition to the enabling clauses some specific conditions were also set for the first and the thrid pillars.

First Pillar specific conditions

Specific conditions for the First Pillar were set out by the Article 11 TEC (ex Art. 5a). The mechanism for the first pillar is defined by so called 'negative list' which reinforces the limitations outlined in the general clauses. In the first pillar flexiblity is restricted by a "negative list", which states that flexibility can be established as long as the proposed cooperation:

1. does not concern areas which fall within the exclusive competence of the Community;
2. does not affect Community policies, actions or programmes;
3. does not concern the citizenship of the Union, or discriminate between nationals of member states;
4. does not go beyond the limits of the powers conferred upon the Community by the treaty;
5. does not constitute a discrimination or restriction of trade between member states, or distort the conditions of competition between them.

This negative list was due to the opposition to the use of the mechanism in the first pillar. Contrary to the 1996 Franco-German proposal to extend the use of enhanced cooperation to the first pillar, there were several other Member States, which rejected the use of flexibility within first pillar. According to Edwards and Philippart, closer cooperation was considered as a real option when it was clear that there was little to expect from QMV (Edwards and Philippart 1999: 96). Only a limited number of policy issues were expanded to QMV decision-making, while most of them were left subject to unanimity. Therefore, closer cooperation was the solution to by-pass the potential deadlock for the issues subject to unanimity. However the resistance of several Member States for the use of mechanism in the first pillar resulted in rather restrictive negative list.

One of the aims of the inclusion of the mechanism into the first pillar was to prevent policy development outside the treaties altogether (La Serre and Wallace 1997: 27). However, having a negative list reduced the potential for the realisation of the closer cooperation (Edwards and Philippart 1997: 20) due to its quite stringent conditions.

The initiating mechanism was also defined. An important role is envisaged for the Commission. This strong role of the Commission signifies the maintenance of traditional community method. The initiative for the mechanism originates from the request of the interested Member States to the Commission. By its proposal, the Commission decides on whether a flexible integration mechanism will be used or not. The opinion of the Commission is final. According to Article 5a(2), the Council authorises such mechanism by qualified majority voting on a Commission proposal following consultation of the European Parliament. However, the Treaty also envisaged the so-called 'emergency brake' that the article gives a Member State the right of veto on the basis of an important and stated reasons of national policy. The Council might then, acting by QMV, refer the matter to the European Council, meeting in the composition of the Heads of State or Government, for decision by unanimity.

Third pillar specific conditions

Like the first pillar, the Third Pillar also explicitly allows for closer cooperation in the EU institutional framework. The Article 40 TEU (Ex. Art. K.12) sets out the conditions for the "police and judicial cooperation in criminal matters". The Article states that closer cooperation :

a) has the aim of enabling the Union to develop more rapidly into an area of freedom, security and justice

b) respects the powers of the EC and the objectives of the Third Pillar.

The trigger mechanism for closer cooperation in the Third Pillar is similar to that of the First pillar but with the exception of Commission's strong position. Instead of a binding proposal, the Commission gives only a non-binding opinion on the initiative put forward by the Member States.

Table 2: General Clauses of Closer Cooperation for the First and the Third Pillars

	Flexibility in the first pillar	**Flexibility in the third pillar**
Treaty Provisions	Articles 43 –45 TEU, Article 11 TEC	Articles 43-45 TEU, Article 40 TEU
Additional conditions?	Yes	Yes
Proposed by:	Interested Member States	Interested Member States

Table 2 (continued)

	Flexibility in the first pillar	Flexibility in the third pillar
Proposal drawn up and authorized by:	Commission	
Decided by:	Council of Ministers using QMV	Council of Ministers using modified QMV, with 62 votes cast in favour by at least 10 Member States
Veto possibility	Yes, "for important and stated reasons of national policy"	Yes, "for important and stated reasons of national policy"
Other institutional contributions	Commission will consult with European Parliament prior to its authorisation. Court of Justice has some review powers.	Commission's opinion must be invited prior to Council decision. Parliament must be informed and the Court of Justice has a qualified right to review.

Source: Gillespie (1997) p. 58, p.60.

The general and specific enabling clauses allow a limited number of willing and able Member States to pursue further integration within the institutional framework of the Union but they do not allow a permanent or irreversible separation between a hard core and less developed integrative units. Therefore, according to Stubb they constitute a modified form of variable geometry (Stubb 1998: 79).

3.4.2 Case-by-case Fexibility: The CFSP Pillar

The case-by-case flexibility is the form of differentiated integration envisaged for the Second Pillar of the EU; the CFSP[21]. Although in the official documents the possibility of flexibility in the second pillar had been laid down, it was only at the Amsterdam European Council that this possibility was eliminated (Ehlermann 1997: 23). Therefore, a flexible integration mechanism was not anticipated for the CFSP and unanimity remained as the rule.

[21] For further detail on flexibility in the area of CFSP, Seminar on "Flexibility and Enhanced Cooperation in European Security Matters: Assets or Liabilities?", WEU Institute for Security Studies. The Occasional paper, edited by Antonio Missiroli includes several comments on different aspects of CFSP. http://www.iss-eu.org/occasion/occ06.html;

Almost all Member States envisaged flexible integration for the second and third but not for the first pillar during the negotiation process. Some authors highlighted the benefits of having "enhanced cooperation" in the field of CFSP. According to La Serre and Wallace to envisage enabling clauses for this area would transform certain kinds of action previously undertaken by only a few to have a kind of EU endorsement (La Serre and Wallace 1997: 25). But on the contrary, the Treaty adopted arrangements of flexible integration for the first and third pillars but not for the second pillar. For the second pillar the so-called constructive abstention is adopted. Edwards and Philippart find it rather surprising that at the beginning of the IGC second pillar was regarded as a 'natural' domain for closer co-operation (Edwards and Philippart 1999: 99).

The elimination of the flexible solution in the second pillar has led to the introduction of "constructive abstention" into the Treaty with Article 23 TEU (Ex Art. J.13). This mechanism allows a Member State to abstain from voting on a decision and declare that it will not apply the decision in question while at the same time accepting that the decision commits the Union (Stubb 1998: 80). Therefore, instead of vetoing, a Member State declares its abstention without preventing others. However, the article also adds that if the abstaining Member States represent more than one third of the votes weighted in accordance with Article 148(2) of the Treaty establishing the European Community, the decision shall not be adopted.

This method puts the emphasis on non-participation. Edwards and Philippart describe it as a system of multiplying discrete opt-outs rather than a system of closer co-operation among a group of willing and able (Edwards and Philippart 1999: 99, footnote 14).

The constructive abstention is not new to the Treaties. Article 205(3) TEC also envisages abstention mechanism.[22] Yet, there is a difference between the two. The abstention mechanism envisaged for the first pillar binds the EU as a whole,

[22] Article 205 (3) TEC states that "abstentions by members present or represented shall not prevent the adoption by the Council of acts which require unanimity."

including the abstaining members, whereas in the second pillar, the decision does not bind the abstaining Member State (Stubb 2000a: 157; Stubb 1998: 81; Stubb 2002:134).

Article 23.2 TEU (Ex Art J.13(2)) introduces QMV for the application of non-military matters, such as adopting joint actions, common positions or when taking any other decision on the basis of a common strategy as well as adopting a decision implementing a joint action or a common position. The Council will also act by QMV while appointing a special representative in accordance with Article 18(5) TEU.

The so-called emergency brake also exists in the second pillar that if a Member State declares that "for important and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority". In this case the issue will be referred to European Council, which decides by unanimity.

The last thing to note about the second pillar is related to the international agreements. For the first time the Treaty enables the Union with the Article 24 TEU (Ex Art. J.14) to sign up to international agreements within the second pillar. However, constructive abstention is also envisaged for this area.

3.4.3 Pre-determined Flexibility

The pre-determined flexibility is the mode of flexible integration which covers a specific field, is pre-determined in all its elements, including its objectives and scope, and is applicable as soon as the treaty enters into force (Stubb 1998: 82). In the Treaty of Amsterdam, pre-defined flexibility was primarily established in protocols and declarations:

- Protocol No. 2 integrating the Schengen *acquis communautaire* into the framework of the EU
- Protocol No. 3 on the application of certain aspects of Article 14 of the TEC to Britain and Ireland
- Protocol No. 4 on the position of Britain and Ireland in the new Title IV on visas, asylum, immigration, and other policies related to the free movement of persons.

- Protocol No. 5 on the position of Denmark in Schengen.

Protocol No. 2- the incorporation of Schengen acquis into the framework of the European Union

This Protocol is an interesting and complicated form of pre-determined flexibility. This complexity stems from the characteristics of the Schengen agreement. Currently the 13 Member States of the Union are also the signatories of the Schengen agreement. However in addition to these, Iceland and Norway are the associate members of the Schengen although they are not members of the Union. The UK and Ireland which are the members of the Union are not members of Schengen, and lastly Denmark, a member of the Schengen, however, has obtained special opt-outs from the part of the Schengen *acquis* to be incorporated into the first pillar.

With the Protocol No 2 Article 1 the Schengen *acquis* is incorporated into the treaty framework.[23] Article 2 provides that from the entry into force of the Treaty, the Schengen *acquis* shall apply to its thirteen signatory states. The Protocol also brings special provisions for some Member States. Article 4 related to Denmark's special situation states that, Denmark will have the same rights and obligations under the third pillar. However for these parts of the Schengen *acquis* that are incorporated to the first pillar, the protocol 5 relating to the position of Denmark will apply. Article 4 and 5 deal with the UK and Ireland that Protocol leaves the room for the eventual accession of the two states. Article 6 sets out arrangements concerning Norway and Iceland. Article 7 deals with the integration of the Schengen Secretariat into the General Secretariat of the Council. Article 8 provides that the Schengen *acquis* and further measures taken by Schengen participants are regarded as an *acquis* which must be accepted in full by all states candidates for admission. Therefore, according to Stubb, this is a clear indication that the Schengen *acquis* has become the general *acquis* (stubb 2002: 137).

[23] While it brings the matters relating to the movement of persons together in the First Pillar, areas concerning criminal law and policy were left to the Third pillar. This structure is complex both legally and institutionally.

Protocol No.3 – the UK and Ireland on border control

This protocol deals with the special arrangements regarding free movement of persons. The protocol provides preservation of the right of the UK to maintain its external border controls. The two states will continue to have Common Travel Area, and special arrangements due to this CTA. Ireland has been pushed into opt-outs mainly because of the special relationship it had with the UK.

Protocol No.4 – the UK and Ireland in title IV

The Treaty of Amsterdam transferred a number of issues from the Third pillar to the first. The new title IV "visas, asylum, immigration and other policies related to free movement of persons" was created. However, three states, the UK, Ireland and Denmark opted out from this title. Protocol No. 4 deals with the special situation of the UK and Ireland concerning this new title. The Protocol provides the basis for these three Member States to pick and choose how and when they want to participate in legislation based on the new title.

Article 1 of the Protocol states that UK and Ireland shall not take part in legislation adopted pursuant to the new title. Article 2 provides that none of the provisions, measures, and provisions of any international agreement of any decision of the ECJ to the new title is binding on or applicable to the UK or Ireland. The Articles from 3 to 8 deal with institutional questions, the way in which the UK and/or Ireland can join the legislation, accept the measures on the new title and the financial consequences.

Article 8 indicates that the UK and Ireland have different approaches towards the new title. Ireland can wave the Protocol at any time, however the same possibility does not exist for the UK. If it wants to reverse the effect of the Protocol, an IGC has to be convened (Stubb 2002: 139).

Protocol No. 5- on the position of Denmark

The Protocol deals with the special position of Denmark concerning three special issues in particular. Articles 1 to 4 provide the exemption of Denmark from the new title IV on visas, asylum, immigration and other policies related to free movement.

The second issue is the Schengen which is dealt with in the article 5. Article 6 which is related to defence issues is the third subject in particular that deals with the Danish opt-out from defence. Like Ireland with Protocol No.5, Denmark can at any time notify the Council that it no longer wishes to avail itself of all or part of the Protocol.

Stubb notes an interesting point regarding Protocol No.5 that the Protocol was never discussed in the IGC and was drafted in Amsterdam in secrecy by the representatives of the Danish delegation and the Council Secretariat, away from the other Member States (Stubb 1998: 89; Stubb 2002: 140).

In general pre-determined flexibility, formed by all these Protocols, was criticised deeply. It was due to the fact that protocols allowed opt-out mechanism from one of the most fundamental principle of the Community, the free movement of the persons. Moreover, by allowing Member States to pick and choose from policy areas it created an à la carte integration. However, according to Stubb, when one considers the further steps taken along the road to full integration, the Protocols, the exemptions given to certain Member States are just a small step backwards (Stubb 1998: 91).

To summarise, the following table is given:

Table 3: Main Forms of Flexibility in the Amsterdam Treaty

Form of flexibility	Definition	Example
Enabling clauses	Enables willing and able member states to pursue further integration (subject to certain conditions set out in the treaties) in a number of policy areas within the institutional framework of the Union	• General flexibility clause (Article 43-45 TEU) • Clauses specific to the first pillar (Article 11TEC) • Clauses specific to third pillar (Article 40 TEU)
Case-by-case flexibility	Allows a member state to abstain from voting on, and to formally declare that it will not apply, a decision which will nonetheless commit the Union	• Constructive or declaratory abstention (Article 23 TEU)

Table 3 (continued)

Form of flexibility	Definition	Example
Pre-defined flexibility	Covers a specific field, is pre-defined in all its elements including its objectives and scope, and is applicable as soon as the Treaty enters into force	• Protocol No. 2 integrating the Schengen *acquis* into the framework of the EU • Protocol No. 3 on the application of certain aspects of Article 14 TEC to Britain and Ireland • Protocol No. 4 on the position of Britain and Ireland in the new Title IV of the TEC • Protocol No. 5 on the position of Denmark in Schengen

Source: Stubb (2000a) p. 155

3.5 Assessment of the Provisions of the Treaty of Amsterdam Regarding Flexible Integration

The Treaty of Amsterdam by introducing three forms of closer cooperation institutionalised flexible integration as "closer cooperation". The relevant provisions were the result of a hard negotiation process during the preparatory work and the IGC. Therefore, provisions should be evaluated as an outcome of this process and as a compromise between the different perspectives of the Member States.

Throughout the process a link between enlargement and flexibility was established. The issue of flexibility was considered among the institutional reform. According to some, closer cooperation was seen as an alternative to the qualified majority voting as there was no satisfactory achievement regarding QMV. According to Church since there was so little consensus on issues of institutional reform, the idea of flexible arrangements, which would allow some states to integrate more deeply, emerged as a way of solving the impasse (Church 2002: 52). For the Member States which were hindered by the unanimity voting, and by the right of veto of Member States, flexible integration was a way of enabling further integration without the inclusion of Member States which are reluctant and might exercise the right to veto. Flexibility

on the other hand, was not a magic solution for the problems. As an operating tool, flexibility can hardly be expected to substitute for institutional changes. According to La Serre and Wallace the creation of forms of closer cooperation did not seem to constitute a satisfactory alternative to a more wide-ranging institutional reform, as a precondition of further enlargement (La Serre and Wallace 1997: 33; Wallace 2000: 190).

The provisions however can still be criticized. After the signing of the Treaty there was rather a negative approach towards the issue of institutional reform including the provisions regarding closer cooperation. Important to state in the beginning, "closer cooperation" is nowhere defined in the Treaty. None of the normal techniques, which have been used by the drafters of the Treaties to ascribe formal foundational significance to a concept or principle, were adopted. Therefore, according to Shaw, the ideological issues raised about the multiple meanings and usages of the concept have remained unresolved (Shaw 2002: 11).

The provisions brought about by the Treaty of Amsterdam were criticized to be too restrictive by many authors (Shaw 2002; Phillipart 2001; Stubb 1998, 2000a, 2000b). Phillippart even described the mechanism as "a dead born child" (Phillipart 2001). According to Shaw despite the innovatory character of the institutional dimension of these provisions, their practical utility has been regularly doubted in view of the severity of the conditions which need to be satisfied (Shaw 2002). The conditions set out by Article 43 TEU can be perceived as quite stringent in that sense. In particular the procedure envisaged to trigger the mechanism was considered as cumbersome with the last resort clause and the necessity to include at least a majority of the Member States (La Serre and Wallace 1997: 43). In addition to the general conditions, specific conditions which were envisaged for the first and the third pillars would make the mechanism even more difficult to function.

The so-called "emergency brake" envisaged by Article 11(2) TEC was also subject to criticisms, although there were some advocates of it. Shaw regards the so-called emergency brake as a worrying example of the importation of intergovernmental influences into pillar one, since it effectively brought a Luxembourg Accords type of

arrangement into play, when a reluctant non-participant cites 'important and stated reasons of national policy'. In that case the Council may request, by a qualified majority, that the matter be referred to the European Council which will itself decide by unanimity (Shaw 2002 13). On the other hand, some politicians have expressed their positive stance towards the emergency brake. Tony Blair in his speech addressed to the House of Common on 18 June 1997 stated that they secured a veto over flexibility arrangements which could otherwise have allowed the development of a hard core, excluding them against their will (La Serre and Wallace 1997: 35). However, the practice of the emergency brake should not be frequent. According to La Serre and Wallace political reality would mean that any government seeking thus to block a proposal for enhanced cooperation would have to provide a powerful justification (La Serre and Wallace 1997:35).

Along with the criticism of strictness of the conditions, Herolf also mentions the vagueness of the formulation of closer cooperation (Herolf 1998a: 11). This vagueness was attributed to the political nature of the provisions in the previous parts (Edwards and Philipart 1997; 1999, supra. P.15). This results in the difficulty to functionalise the mechanism. In terms of the last resort, who would decide closer cooperation should be an issue of last resort or whether the objectives of the said Treaty could not be attained by applying the relevant procedures or not? Regarding other general conditions it is not easy to determine whether or not it would affect the competences, rights, obligations and interests of those Member States, who do not participate therein. While there already exists a debate on the competences of Member states and the Union, who would draw the line between rights, obligations and interest Member States and the Union? Similar criticisms can also be brought in terms of the specific conditions for the first pillar, the so-called negative list.

Due to the restrictive provisions regarding closer cooperation, attempts to operationalise the flexibility clauses after Amsterdam were not successful. Shaw gives the example of the adoption of the Statute for the European Company as the failure of the mechanism. A combination of the restrictive provisions, the emergency brake applied by Spain in the case of the Company Statute, and the psychological barrier of using the provisions for the first time meant that moot discussions never

went beyond the preliminary (Shaw 2002: 14). One the other hand, Shaw argues that there was no time for the application since the Treaty of Amsterdam entered force in 1999, and already in 2000 there was the new IGC; IGC 2000 (Shaw 2002: 14).

The restricted wording of the Treaty in terms of the closer cooperation provisions can be rationalised with some further reasons. According to Stubb, the reason that led to restrictive wording in the Treaty was the disappearance of the pressing needs for flexibility which were mentioned before. In terms of the EMU, it was obvious that eleven Member States can fulfil the convergence criteria and the realisation of the third phase of the EMU seemed highly possible. The incorporation of Petersberg tasks into the treaty and the introduction of constructive abstention in the CFSP Pillar also removed the urge for the functioning of flexible integration. The issue of free movement of people was solved by the transfer of this policy area to first pillar from the third pillar and by opt-outs given to Denmark, the UK and Ireland. (Stubb 2000b: 147). The issue of enlargement was also solved implicitly by postponing the issue (Stubb 2000a: 154). Due to these facts the enabling clauses were rather restrictive than providing a suitable condition for the functioning of the mechanism. The new UK government, which was more pro-European than the previous one, (Stubb 2000a: 154; 2000b: 148) also reduced the scepticism of Britain in terms integration and the need to bypass the UK was not necessary anymore.

One should also take into account the risk of fragmentation by the practice of the mechanism. Therefore, the conditions were set out to eliminate that risk. Esposito is rather negative towards closer cooperation in terms causing fragmentation and leading to an à la carte Europe. On the one hand he does not deny that flexibility will indirectly soften the conditions for accession because existing Member States know that they can manage the differences between the members, and with the new members, by using this principle. However, the main impact will certainly be on the institutional framework which can evolve towards a *Europe a la carte* (Esposito 2001: 103). He continues that whatever kind of differentiation is applied, the EU will hardly be able to maintain a single institutional framework if half of the Member States profit from specific conditions. Therefore, this would lead to dilution of the integration process despite the fact that the debate about the institutional questions

showed a tendency towards a deepening (Esposito 2001: 105). Therefore, envisaging stringent provisions can be perceived as a means to prevent the fragmentation and to preserve the single institutional framework.

Incorporation of the mechanism into the Treaty, even with limited conditions, serves to preserve the single institutional framework and also to abolish the risk of having cooperation outside the treaty framework. The book published by the Centre for Economic Policy Research points out the risk of having cooperation outside the Treaty framework with three dimensions (CEPR 1995: 14). Firstly, it may be detrimental to the proper functioning of the Union itself by undermining the basic elements of free trade and mobility. Secondly, it may create exclusive groups that could become politically divisive. Lastly, outside arrangements might start to mushroom. This would make it more and more difficult for European citizens to understand the identity of the Union. With the ToA, the determination of some member states to proceed further and faster with integration has been accepted as legitimate. According to La Serre and Wallace this is intended to remove the temptation to develop new areas or to intensify integration outside the framework of the EU (La Serre and Wallace 1997: 34).

However, the future practice will show whether the incorporation of the flexibility clauses would prevent the cooperation among some member states outside the Treaty framework or not. The Treaty only provides the right to use the EU framework; therefore there are no limitations for the closer cooperation outside the treaty. And if one considers the restrictive wording, strict conditions to operate the mechanism, the risk of cooperation outside the single institutional framework still remains. Yet one can still look from the other side of the coin. To have the possibility of functionalising the mechanism within the Union, even subject to strict conditions, is still better than not to have such possibilities within the Union. Edwards and Philippart envisage two options for the operation of the mechanism. One option is that the mechanism would discourage efforts to reach a compromise within the Council because the possibility of using flexibility clauses would allow to by-pass the minority. Second option, on the other, could be the encouragement of an eventual compromise. A possible threat of flexibility for the ones who would be left out with

the creation of a mechanism with limited number of members states, may lead to reconciliation (Edwards and Philippart 1997: 17).

Another criticism was raised regarding the complexity of the system. The provisions complicated the institutional framework and caused the rise of further practical issues potentially. The practical might arise when a Member State which did not join a certain group holds the Presidency, i.e. the EMU and the British Presidency (Herolf 1998a: 11; Edwards and Philippart 1997:pp.17-19). Besides these practical and institutional questions, further complexity of the system with the Treaty of Amsterdam has made it difficult for European citizens to understand the Union (Laursen 2002; Ehlermann 1997). Moving of some elements to first pillar from the third one, and the incorporation of the Schengen *acquis* into the Treaty, the UK and Ireland having kept their own border controls, and Denmark not taking part in supranational first pillar JHA cooperation, but being free to join on an 'intergovernmental' basis do not make things easy to understand (Laursen 2002). According to Ehlermann closer cooperation inside the EU may thus very well have negative repercussions on the EU's acceptance and legitimacy, unless the positive practical results of the cooperation can balance out the institutional loss (Ehlermann 1997: 7).

3.6 Conclusion

The provisions of the Treaty of Amsterdam have provided the constitutional recognition of the flexible integration mechanism within the Union. Flexibility, which had already had a place in the history of the EU, became a legitimate method to pursue deeper cooperation within the Treaty framework.

The issue of flexible integration was not one of the first items on the agenda of the IGC. But potential deadlock in some of the policy areas such as EMU, enlargement and also the Euro-sceptic government in the UK resulted in deeper discussions about some flexible integration methods to remove the obstacles causing deadlock in some policy areas and to by-pass unwilling Member States. The efforts of willing Member

States such as Germany and France also had an impact on the shaping of the discussions. While at the beginning one could consider flexibility only by constructing a link with enlargement, with the report of the Reflection Group of 1995, it became certain that flexibility was one of the crucial issues on the agenda of Treaty of Amsterdam.

During the IGC, there had been great achievements on the issue, although some of the crucial issues remained unresolved until the final Summit. Both Presidencies, the Irish and the Dutch worked on the issue thoroughly. The efforts of Germany and France continued in favour of the institutionalisation of the mechanism. Other Member States were rather vague in their views and still others changed their stance overtime. The pressing need for the discussion of the issue also faded away due to agreements among the Member States regarding challenging issues which might have led to deadlock in the integration process and due to the change of the UK government.

The draft article on the issue on the eve of the European Council of Amsterdam, conveyed the common views. However, some important questions such as the issue of a triggering mechanism, and enabling clauses in the second pillar were left to the Summit. Surprisingly despite differences in the views of the Member States it was one of the few issue on the agenda of the IGC which was solved rather easily, especially when one considers the severe discussions on other issues of institutional reform.

The Treaty of Amsterdam institutionalised the mechanism by introducing three forms of flexible integration as enabling clauses, case-by-case flexibility and pre-determined flexibility. The result, in particular for the enabling clauses was a strict wording. The vagueness of the conditions that derive from their political nature and the severity of the provisions can be understood in light of the Union's goal of preserving the single institutional framework. While satisfying the expectations of the willing Member States by legalising the mechanism, the fears of the unwilling and/or willing but unable Member States regarding the creation of a hard core and

preservation of the single institutional framework were also eased by stating restrictive conditions. The Treaty aimed to preserve unity in diversity.

The Union rejected an à la carte menu option which could have easily led to fragmentation. It can be argued that the provisions would not lead to a tiered system either. According to Gilllespie, the system introduced with the ToA resembles the concentric circles of Balladur. The concentric circles will be defined by the level of involvement, and therefore of influence, of the Member States. Whether large or small, those participating in all these spheres will be in the inner circle, while those which opt out from several of them will be less influential, and therefore less well able to defend their vital interests (Gillespie 1997: 63).

The Treaty of Amsterdam, even with its restrictive provisions, established a norm of governance which will need review. If one takes into account the enlargement process, spreading of EU policies and the diversity within the Union, it is clear that the Union in the future will require flexible means in its governance. Alongside the criticism raised against the provisions of the Treaty, the Treaty itself should be considered as a step in the process.

CHAPTER 4:

THE INTERGOVERNMENTAL CONFERENCE OF 2000 AND THE TREATY OF NICE

Another step in the evolution of flexibility is the IGC 2000 and the Treaty of Nice. The mechanism was institutionalised with the Treaty of Amsterdam and the Treaty of Nice took steps to loosen its conditions. This chapter will examine the process of the IGC 2000 and the Treaty of Nice.

The IGC 2000, with its narrow agenda, was different than the previous IGCs. An element of criticism for the IGC 1996 was its broad agenda and a lack of focus on particular issues. The limited success of the Treaty, in terms of institutional issues, was linked to this broad agenda. The IGC 2000, however, adopted a quite narrow agenda by dealing almost exclusively with so-called Amsterdam leftovers. Nonetheless, it was also criticised due to this narrow agenda.

There were controversial views on the scope of the agenda which was linked to the enlargement process. There were different views on whether the conditions regarding the flexible integration should be revised or not. The arguments in favour of loosening flexibility clauses prevailed over the arguments against changing the provisions and the result was the inclusion of the issue on the agenda in Feria European Council of June 2000. Due to the late inclusion of the issue on the agenda much of the work was done during the second half of the IGC. However, there not many things left to be discussed at the Summit.

First, the agenda-setting and preparatory work will be presented. The reasons that led to the inclusion of the issue on the agenda will be examined. Developments during

the IGC process and the views of the member states will be stated. The outcome of this process, the provisions in the Treaty of Nice will be given in detail, and finally a critique of these provisions will be made.

4.1 A Narrow or a Wider Agenda?

The main motive behind the IGC 2000 was to deal with the Amsterdam leftovers, specifically with institutional issues. The need for further reform to prepare the Union for the accession of the new Member States was acknowledged in the Protocol No. 7 of the Treaty of Amsterdam. The Protocol envisaged an institutional reform in two stages. The first stage was considered as limited type of reform, which was expected to coincide with the date of the first enlargement. The comprehensive reform through a new IGC, on the other hand was planned to be realised "at least one year before the membership of the Union exceeds twenty". Although the Protocol envisaged a reform in two stages, it was decided that the necessary institutional reforms would have to be introduced after a single IGC, before the accession negotiations with the most advanced applicant countries reach a conclusion.

In preparation for IGC 2000 a committee known as the group of "Wise Men" was established. It consisted of the former Belgian Prime Minister Jean-Luc Dehaene, former German President Richard von Weizsäcker and Lord David Simon. Instead of the Reflection Group of IGC 1996, a group of high-level experts was preferred for the IGC 2000. The Committees, which were responsible from the preparation of the previous IGCs, were all set up by the governments, therefore they were under the control of national governments. The Dehaene Committee differed from those that it was the attempt of the Commission.

The issues at the centre of the bargains were the Amsterdam leftovers. However, there were controversial views with regard to the scope of the agenda of the IGC. The scope of the agenda was directly related to the issue of flexibility. According to Stubb a Member State which supported flexibility was deemed to support a wide agenda whereas a partner who did not want to deal with flexibility was considered a

minimalist (Stubb 2000b: 152). A link was also established with the scope of the agenda and timing of the forthcoming enlargement. A narrow agenda meant a short IGC and an early enlargement, whereas wide agenda meant a lengthy IGC with a postponed enlargement (Gray and Stubb 2001: 8).

Smaller Member States in general, were in favour of a wider agenda, as a narrow agenda would result in the reduction of their relative power in the bargaining process. Whereas with a wider agenda they would have more space and at the end they would get a more balanced final package (Yataganas 2001: 9). On the other hand, larger Member States, defended a narrow agenda for substantive and procedural reasons. The substantive reason was their concern that a wider agenda would lead to deeper integration. In terms of procedure, the intention of the larger Member States was to keep the agenda limited in order to ensure the IGC's completion by the end of the year (Dinan and Vanoanacker 2000-2001).

The opinions of the EU institutions also varied. The *European Parliament* like the smaller Member States supported a wider agenda and proposed a long list of issues to be dealt with during the IGC (European Parliament 1999; European Parliament 2000a). The Parliament welcomed flexibility with its Report issued in March. But it also stated that it should only be used when the EU is genuinely incapable of collective action, with a membership of at least one-third of the Member States and after the Council has approved the creation of a "pioneer group" by a qualified majority (European Parliament 2000b: 12). The *Commission's* opinion was similar to the Parliament's. The Commission suggested the inclusion of closer cooperation into the agenda (Commission 2000a). According to the Commission, veto should be removed, a minimum number of Member States should be set as one third of the Member States and the possibility of using the mechanism in the second pillar should be allowed (Commission 2000a: 33-34). Opinion of the *Council* differed from the other two institutions with its support for a concise agenda via minimal institutional changes to meet the operational need of enlargement.

The Cologne European Council of 3-4 June 1999 referred only to the issues on the Protocol, therefore did not mention flexibility (European Council 1999a). The

Helsinki European Council of 10-11 December 1999 also set a limited agenda mainly based on the Amsterdam leftovers. Yet it also stated that the agenda can be widened by the report of the incoming President on the progress in the Conference and on the possible additional issues to be taken on the agenda (European Council 1999b). At the Helsinki Summit the Portuguese Presidency was given the task of proposing additional issues to the agenda.

The IGC was inaugurated on the 14 February 2000 under the Portuguese Presidency, after the Dehaene Report on the institutional implications of enlargement, the contribution of the Commission to the Report, the opinions of the Commission and the European Parliament.

During its Presidency, Portuguese put the emphasis on the need for a wider agenda stating that a restricted agenda would not give enough space for successful bargaining (Edwards and Wiessala 2001: 45). The issue of closer cooperation was first discussed under the Portuguese Presidency at an informal meeting of the representatives, which was held in Sintra on 14 and 15 April. Potential difficulty in the application of the mechanism was the reason for the issue to be raised in the meeting. There were arguments for and against the inclusion of the issue on the agenda.

Arguments against changing the provisions are as follows:

- Existing provisions reflect a careful balance and they are adequate for enlargement.
- Current provisions have not been used yet, so it is difficult to determine where they could be applied (Stubb 2000a: 152; Dinan and Vanhoanacker 2000-2001),
- Loosening the flexibility clauses might lead to the creation of a core within the EU which would lead to different classes of membership and damage the *acquis communautaire* ((Stubb 2000a: 152;Dinan and Vanhoanacker 2000-2001; Stubb 2000b: 152; Stubb 2002: 110)

Arguments in favour of loosening flexibility clauses are as follows:

- Current mechanism is too stringent for enlargement
- If the clauses are left unchnged that would result in further integration outside the treaty framework ((Stubb 2000b: 153; Stubb 2002: 111; Stubb 2000a: 153; Dinan and Vanhoanacker 2000-2001).
- Flexibility is the second-best instrument after QMV. Flexibility would allow the Union to adapt to changing circumstances (Stubb 2000b: 153; Stubb 2002: 111) According to Gillespie flexibility would provide a possible way around the unanimity barrier where Member States cannot agree to move to QMV (Gillespie 2001: 80). This can be a tool both for the willing and unwilling Member States. The wiling and able Member States can use the mechanism against the unwilling Member States. On the other hand it also serves unwilling and unable to prevent or delay a vanguard group, hence creating an exclusionary two-tier system (Gillespie 2001: 80).

The final say on the agenda was in Feira European Council of 19-20 June 2000. The final decision was to adopt a relatively narrow agenda with the inclusion of closer co-operation (CONFER 4750). The Feira Summit was the success of the Portuguese Presidency that it solidified the terms of the agenda for the Conference. The arguments for the inclusion of the issue on the agenda prevailed over ideas that were against its inclusion. Flexibility was also an element in the negotiation process. Success on the issue would balance the unresolved institutional issues such as reweighting of votes in the Council or the number of Commissioners.

The idea to include closer cooperation into the agenda was pushed by the Belgians and the Dutch, supported by the Commission and the Parliament. But the willingness of France and Germany was decisive for the issue to be put on the agenda (Dinan and Vanhoanecker 2000-2001). The risk of using the mechanism outside the scope of the Union pushed the states to consider relaxation of clauses. The speeches of Chirac and Fischer were important in that sense (Stubb 2002: 107). The speeches are going to be assessed more in detail in the overview of positions of Member States.

4.2 Second Half of the IGC 2000: Progress in Flexibility

France took the Presidency from Portugal in the second half of the year and the Treaty of Nice was concluded under the French Presidency. The second half of the IGC under the French Presidency was subject to more substantial discussions on the issue. Although the issue of closer cooperation was not put on the agenda until the Feira Summit of June 2000, it was one of the issues that the Member States agreed upon the establishment of conditions. After the Feira Summit, the French Presidency in July submitted questions concerning the application of flexibility and asked whether the existing clauses should be redrafted or consolidated. These five questions were related to authorisation conditions, restrictive conditions, possibility of different authorisation conditions for different sectors, extension to CFSP, closer cooperation outside the institutional framework (CONFER 4758).

The successive Presidency documents of August 30 and October 5 set out the general guidelines and the closer cooperation mechanism under TEC, CFSP and Third Pillar (CONFER 4766; CONFER 4780). General conditions envisaged that the closer cooperation should:

1. be aimed at further integration,
2. respect the provisions, *acquis* and single institutional framework,
3. not restrict trade and distort competition,
4. involve minimum 1/3 of or (x) number of Member States,
5. be open to all Member States,
6. not affect the rights, powers, obligations of those Member States who does not participate,
7. be used as last resort.

The removal of the veto was also stated.

After defining the general conditions for the mechanism, the special conditions for each pillar of the Union individually were also discussed. The aim of the mechanism was defined as contributing to the implementation of a common strategy for the CFSP and also as enabling the Union to develop more rapidly into areas of freedom, security and justice under the third pillar.

At the Biarritz European Council of 13-14 October 2000, there is almost a unanimous agreement on the issue of flexibility, although the disparity between the Member States Concerning other institutional issues became clearer. In terms of critical mass, the majority of member states accepted a number below the half of Member States. There was not a major disagreement on the conditions of the mechanism either. One problematic issue was the use of flexibility in Pillar II. Here, CFSP and defence issues were considered separately. For defence, although both enabling clauses and pre-defined flexibility were considered as possible options, they were both dropped in the final stages of the negotiations. One can conclude that progress in this area would constinue be coloured significantly by an extra-EU dimension (Warleigh 2002: 51). In CFSP, flexibility was considered only for the implementation of common positions and joint actions.

Thanks to the substantial progress during the French Presidency Member States more or less agreed on the general principles and on the conditions of closer cooperation. If one considers that some of the institutional issues were left to the Nice Summit, as there was no solution, the agreement on the issue of closer cooperation was a success. At least almost all Member States declared that a political agreement had been reached on flexibility (Stubb 2002: 118). However, despite the general agreement, no actual article drafts appeared on the table.

The document providing the full text on enhanced cooperation in the form of Treaty provisions was issued in October 18 (CONFER 4786/00). There was more or less an agreement on the basic issues so that the later documents remained same with minor changes. The second article Draft was discussed by the representatives on 13 November (CONFER 4798) and the third was in an informal representatives' meeting in Val Duchesse (CONFER 4810). The issues most discussed were related to the scope of flexibility (whether internal market should be excluded), critical mass, joining mechanism, role of the institutions, second-pillar flexibility. The final meeting on flexibility was the ministerial conclave on 3 December. According to Stubb, for the first time there was a sense of negotiation at the ministerial level (Stubb 2002: 119). Only the issue of flexibility in the second-pillar was left to Nice Summit.

The European Council of Nice, the longest European Council in EU history, met between 7 and 11 December. The issue of flexibility surprisingly was one of the few issues for which progress was achieved before the Summit opened. Flexibility was discussed for a total of 15 minutes during the Summit (Stubb 2002: 119). During the IGC, there was already a draft submitted by the French Presidency on closer cooperation on which the parties agreed. The only issue during the Summit that lead to controversy was the British insistence to remove defence from proposals on closer cooperation.

4.3 Positions of Member States During the IGC 2000

The categorisation of Member States as the "willing and able", "willing but unable", "unwilling but able" made by Philippart has also been valid for the IGC 2000. The willing and able Member States are also the ones that can be described as the integrationist. Those Member States such as the Netherlands, Luxembourg, Italy and Belgium showed their opinion in favour of flexibility firstly in the agenda-setting period. They argued that flexibility should be included as it is the essential part of the institutional package (Stubb 2000b: 145). As it is mentioned above in the agenda-setting subtitle, the effort of France and Germany were also decisive in the inclusion of the issue on the agenda. These Member States maintained their favourable approach during the negotiation process. The sceptical Member States such as the UK, Denmark, were not willing to have the issue on the agenda. According to Dinan and Vanhoanacker Britain, Denmark and Sweden were suspicious that enhanced cooperation might lead to further integration, whereas Spain, Greece and Portugal were distrustful as they might never be able to catch up (Dinan and Vanhoanacker 2000-2001). The first three Member States fit the category of the able but unwilling whereas the latter group signifies the unable Member States. However, the issue surprisingly did not create a major division between the Member States.

The position papers issued during the IGC and the speeches of some of the leaders on the issue of flexibility are illustrative to better understand the stances of Member States. The speeches of German Foreign Minister Joschka Fischer and French

President J. Chirac were significant in terms of noting how the discussion on the issue of flexible integration was shaped. While launching a significant debate on the "future of Europe", the speeches had also an important impact on flexibility as it was perceived not only a tool of decision-making but more related to integration process in the EU. References to cores outside the current institutional framework mentioned in the speeches of Fischer and Chirac convinced the opponent states that flexibility should be put on the agenda (Stubb 2002: 114).

Taking into account the twin challenge of widening and deepening, Fischer's speech at the Humboldt University on 12 May 2000 called for an interim step of forming a centre of gravity on the road to completing political integration of EU. This would later develop in to the nucleus of an eventual federation. According to Fischer, closer cooperation is not the end of integration but as an interim step for the constitution of a European Federation. Nonetheless, it has to be ensured that the EU *acquis communautaire* is not jeopardized, that the Union is not divided and the bonds holding it together are not damaged, either in political or in legal terms (Fisher 2000). Chirac, answered the speech of Fischer at the German Bundestag on 27 June 2000. In contrast to Fischer, Chirac stated that a "pioneer group" has to be formed. He envisaged multiple areas of reinforced cooperation such as cooperation in the field of political economy, defence and security. His approach was more of a traditional preference for an intergovernmental Europe (Chirac 2000 in Gillespie 2001: 82). It seemed that, both Member States have largely agreed on further developing the integration process. However they have different perspectives on the future institutional architecture, with Germany leaning more towards federalism and France more towards a Europe of Nation-States. The speech of Fischer indicated how Germany would want to strengthen the 'supranational' aspects, whereas in Chirac's speech 'intergovernmental' aspects of European integration were determinant. (Laursen 2002: 19-20).

One of the opponents of France and Germany on the issue of flexible integration has always been the UK. Britain has long argued that countries arguing for more flexibility ought to make a "stronger case" for change. None has put forward a concrete example of the sort of project it would like to carry forward, but cannot do

so under the current EU rules (Economist, 4.22.2000). However, this strong opposition of the UK had changed overtime. On the eve of Biarritz Summit there was the tacit approval of the UK, as well as Sweden.

Positions of the three Member States, Germany, France and the UK reflect schematically three different models of differentiation. Fischer's model is the federal core that perceives flexibility as a transitional stage. Chirac's is the system of multiple cores, more loosely linked institutionally, in which those states present in most or all of the cores would be more influential. Blair represents the Eurosceptic approach, the à la carte model of integration (Gilespie 2001: 90).

During the IGC there were also some position papers delivered by other Member States. The first one is a proposal submitted by Spain on 14 July on flexible integration in the second pillar (CONFER 4760). The Spaniards were in favour of extending closer cooperation to the CFSP. According to their proposal, closer cooperation in foreign policy would give a chance to all those Member States which have fulfilled the required conditions to participate in specific initiatives on behalf of the Union, could avoid the systematic emergence of restricted groups, and would therefore be perceived as a factor for unity in the Union's foreign policy. In addition to the proposal submitted to the IGC, Jose Maria Aznar, the Spanish Prime Minister said that it is possible to argue that Member States which undertake enhanced cooperation will become the parents who, by a process of combination and shared commitment, will produce a new, more full and complete reality (Brown 2002: 12).

The Benelux countries have been strongly in favor of flexible integration. Belgium issued a note on 28 August 2000 containing the Belgian delegation's comments on the subject. Belgium was in support of loosening the conditions of access into the Pillar I. She favored abolishing the veto and introducing a qualified majority system for access to closer cooperation under Pillar I. She considered that the minimum number of participants should be kept at the current level, i.e. eight. In terms of the CFSP, closer cooperation might prove useful but only as regards the implementation stage (CONFER 4765). Memorandum from the Benelux countries on 19 October 2000 also reflected the positive approach to the flexible integration mechanism

(CONFER 4787). However, the Belgian Prime Minister Guy Verhofstadt of September 2000 explicitly stated at his speech that the mechanism should not become an intergovernmental instrument and not create a two-speed Europe (Brown 2002: 12; Gillespie 2001: 82).

The joint statement of Schröeder and Amato in September 2000 illustrates the approach of the both Member States to flexible integration. They perceive increased cooperation as an instrument for promoting integration but not for dividing the Union. They also pull the attention to the risk of cooperation outside the treaties which would be a less desirable alternative (Schröeder and Amato 2000).

This joint statement was followed by a joint paper by the German and Italian delegations submitted to the IGC Group of Representatives on October 4, 2000 (CONFER 4783/00). With this paper Germany and Italy rejected the notion of a "Europe à la carte"; enhanced cooperation should not lead to uncoordinated, random parallel initiatives of divergent groups of Member States. In this sense, the goal is not so much "enhanced cooperation" but "enhanced integration". Germany and Italy further consider revision of the treaty provisions in order to abolish the possibility of the national veto powers. Germany and Italy further proposed to abolish the last resort clause. In terms of CFPS, closer cooperation in their opinion would have greater importance in this field.

The provisions on closer cooperation were shaped in light of the discussions during the IGC. Therefore, the provisions should be assessed as the outcome of this process. Having examined the contribution of Member States to the ongoing debate on flexible integration, the adaptations made in to the provisions under the Treaty of Nice will be outlined in some detail.

4.4 Outcome of the Negotiation Process: The Legal Provisions

The Treaty of Nice used the term "enhanced cooperation" rather than "closer cooperation" as adopted by the Treaty of Amsterdam. Despite the change in the

terms used, the general scheme almost remained the same as established by the Treaty of Amsterdam. However, the new provisions loosened the strict provisions of Treaty of Amsterdam. [24]

4.4.1 The Enabling Clauses

The general enabling clauses in the Treaty of Nice resemble to those of the Treaty of Amsterdam. Articles 43 to 45 TEU set the general conditions. Some of the conditions remained unchanged, but some of the conditions are loosened to make the mechanism function more easily. In the Treaty of Amsterdam, there were only specific enabling clauses for the first and the third pillars, whereas in the Treaty of Nice specific conditions are envisaged for all pillars, including the second one. Along with the general enabling clauses, clauses specific to the Pillar I were set in Article 11 TEU, those for the Pillar II in Article 27 and those for the Pillar III in Article 40.

4.4.1.1 General enabling clauses

The general flexibility clauses in the Treaty of Nice are drawn together under title VII of the TEU. Title VII, "Provisions on enhanced cooperation" provide the general conditions and institutional arrangements for the enabling clauses between the articles 43-45 TEU.

The general conditions provided that enhanced cooperation:

(a) is aimed at furthering the objectives of the Union and of the Community, at protecting and serving their interests and at reinforcing their process of integration;

(b) respects the said Treaties and the single institutional framework of the Union;

(c) respects the acquis communautaire and the measures adopted under the other provisions of the said Treaties;

(d) remains within the limits of the powers of the Union or of the Community and does not concern the areas which fall within the exclusive competence of the Community;

[24] For a very detailed comparison between the provisions in Amsterdam and Nice on the basis of tables see Shaw, http://home.um.edu.mt/edrc/shaw.doc

(e) does not undermine the internal market as defined in Article 14(2) of the Treaty establishing the European Community, or the economic and social cohesion established in accordance with Title XVII of that Treaty;

(f) does not constitute a barrier to or discrimination in trade between the Member States and does not distort competition between them;

(g) involves a minimum of eight Member States;

(h) respects the competences, rights and obligations of those Member States which do not participate therein;

(i) does not affect the provisions of the Protocol integrating the Schengen acquis into the framework of the European Union;

(j) is open to all the Member States, in accordance with Article 43b

Condition (a) remained almost the same with the addition of the phrase "reinforcing its process of integration". The addition of the phrase in paragraph (a) reaffirms the logic adopted in Amsterdam which perceived the mechanism as a way forward towards deeper integration. According to Shaw, this reinforcement is extremely interesting that, this is the first citation of the concept of "integration" in the EC and in the EU Treaties. Such cooperation is perceived as a means of integration (Grevi 2004: 60; Shaw: 26).

Paragraph (b) remained untouched from the Treaty of Amsterdam to Nice. In terms of paragraph (c) a slight change was adopted. Amsterdam used the wording "does not affect" whereas in Treaty of Nice new wording "respects" was used. Amsterdam wording was potentially more stringent than the wording of Nice (Stubb 2002: 125).

The clause set out in paragraph (d) was imported from the first pillar-enabling clause in the Treaty of Amsterdam. According to Stubb it is a logical condition because in areas of exclusive competence it is only the Community which has the right to act (Stubb 2002: 125). Therefore, enhanced cooperation cannot apply to matters in which the EU has exclusive competence. However, exclusive competence is not defined in the Treaties like the principle of subsidiarity (Shaw 1998; Edwards and Phillipart 1997, 1999; Ehlermann 1997). This clause is important because it limits

flexibility to the framework of the treaties and clearly states that flexibility should not create new powers in community (Stubb 2002: 126).

A special reference is made to the internal market and socio-economic cohesion within the general conditions in paragraph (e). This condition was also imported from the first pillar. The wording has been changed from "does not affect Community policies, actions and programmes" to "does not undermine the internal market as defined in Article 14(2) of the TEC, or the economic and social cohesion". With this clause, applying flexible integration to areas closely related to internal market is excluded. Although some argue that this clause excludes flexibility in the Community Pillar altogether, Stubb claims that this is rather a very narrow interpretation (Stubb 2002: 126). Specific conditions to the first pillar indicate that the mechanism is envisaged for this pillar with the exception of closely linked issues to internal market.

Another clause which was imported from the first pillar is paragraph (f). The inclusion of this phrase in general conditions is somehow debatable. In terms of competition policy for instance it is legally not necessary to put it as a condition that competition is not an area where differentiation can be used anyway (Ehlermann 1997: 10).

The last two conditions mentioned above, according to Gilespie, strengthen the Treaty's common provisions (Gillespie 2001: 85). They serve for the preservation of the unity of the Union. Gillespie therefore finds the more permissive minimum number of Member States for initiating the mechanism against that background.

Paragraph (g) brings a fundamental change in terms of the general conditions regarding the issue of critical mass. The term "critical mass" stands for the minimum number of Member States that are required for the initiation of the mechanism. The figure, which was set as "at least a majority of Member States" in Amsterdam, was changed to eight in Nice. The number is decreased to facilitate the functioning of the mechanism against the risk of its application outside the Treaty framework. The number of Member States which would constitute the critical mass was one of the

issue which was discussed thoroughly during the IGC. Stubb pulls the attention to the point that critical mass envisaged for enhanced cooperation is less than the requirement for a qualified majority (Stubb 2002: 126).

Like condition (c), condition (h) has remained the same albeit with a small change in wording. Instead of the term "respects", Treaty of Nice adopted "does not affect". This condition is important for the ones who would remain outside of flexible integration mechanisms.

Condition (i) highlights the specific nature of the Schengen acquis. The fundamental principle of "openness" to avoid the creation of a hard core is set with Condition (j).

These conditions reflect a more delicate balance between the interests of participants and non-participants (Brown 2002: 13-17). However, as it was the case for the general conditions, these conditions can be criticised for being political in nature. Competence, no where defined, how would draw the framework of for flexible integration mechanism?

The "last resort" clause was set in Article 43a in the ToN. It was among the general conditions in Treaty of Amsterdam. Political nature of the conditions can be seen in Article 43a as well. The same question that was asked in the previous chapter remains the same. Are there objective criteria determining what is a last resort? (Stubb 2002: 128) The following article, Article 43b is related to participation. Like Treaty of Amsterdam the mechanism is set as open to all to all Member States.

The articles on enhanced cooperation do not include decision-making procedures. In terms of institutional applications of the mechanism reference is made in Article 44 to the relevant articles in the Treaty. Article 44 states that all members of the Council shall be able to take part in the deliberations, only those representing participating Member States shall take part in the adoption of decisions. There is not much difference between the provisions of Amsterdam and those in Nice in terms of institutional matters. Qualified majority is defined as the same proportion of the weighted votes and unanimity will be constituted by only those Council members

concerned. However the Nice Treaty adds that such acts and decisions shall not form part of the Union *acquis*. The intention behind the addition of this clause is clear; to protect the interest of the non-participants. However, according to Shaw, this clause is misleading. He states that boundaries of *acquis* cannot easily be drawn as it was seen in the field of social policy. The decision of Court of First Instance about the agreement on social policy from which the UK opted out indicates that the Court treats the measure as an "ordinary" measure of Community law. Therefore;

> the application of the general provisions of the EC Treaty to the enhanced cooperation measure has the capacity to contribute to the incremental development of a single and generally applicable case law on concepts of judicial protection and access to justice (Shaw: 32).

He adds that "at least the *acquis* will inevitably develop if the enabling clauses fro enhanced cooperation are actually implemented, even if the specific policy measures adopted are themselves excluded from the *acquis*" (Shaw: 32).

Article 44a corresponds to Article 44(2) in Amsterdam Treaty, which is about the expenditures. The article almost remained the same, with only exception, addition of the consultation to European Parliament before the Council decides by unanimity for all cost to be borne by the Community. Otherwise, as it was the case in Amsterdam, expenditures, other than administrative costs will be borne by the participating states. The issue is what is administrative cost?

Article 44(2) corresponds to article 43(2) of Treaty of Amsterdam. It states that non-participating member states shall not impede the implementation of enhanced cooperation.

The role of the Parliament is enhanced by article 44a which states that the EP should be consulted in terms of expenditures to the Parliament. However, the old Article 45, which gave the task to Council and the Commission to give regular information to the Parliament about the development of the closer cooperation, has been removed by the new Treaty. Innovation of the Treaty in terms of strengthening the role of institutions comes with the new Article 45. According to this Article the Council and the Commission will ensure the consistency of activities undertaking on the basis of

this Title and the consistency of such activities with the policies of the Union and the Community. This article serves to strengthen the role of EU institutions as the guardians of flexibility and to guarantee the consistency and continuity of EU policies (Stubb 2002: 129). According to Shaw the article ensures that enhanced cooperation does not have a divisive and fragmentary impact upon the legal and political order of the Union, but is able to operate –on the contrary- as a constructive tool of governance within diversity (Shaw: 31).

4.4.1.2 Specific Conditions

In addition to general enabling clauses, specific conditions were envisaged for each pillar. The reason is the different natures of the pillars. The first pillar is the community pillar dominated by the community method, whereas the second and the third pillars are intergovernmental in nature.

4.4.1.2.1 First Pillar Specific Clauses

Flexible integration in Pillar I was an issue of controversy throughout the IGC 2000. In the early stages most of the Member States opposed to the idea of flexibility mechanism in the first pillar. It was the case in Amsterdam and resulted in the inclusion of a negative list. The so-called negative list envisaged for the first pillar in Treaty of Amsterdam (supra 49) was incorporated to general conditions in Treaty of Nice. Articles 11 and 11(a) set the specific enabling clauses for first pillar flexibility mechanisms.

Article 11 revisits the procedural arrangements for establishing flexibility. Interested Member States shall address a request to the Commission, the Commission draws up a proposal to the Council and the latter after consulting the EP gives authorisation by acting qualified majority voting. Up to this point the procedure is the same as it was laid down in Amsterdam. The novelty of the Treaty of Nice is the removal of the "emergency brake". The right of veto on the basis of an important and stated reason of national policy is no longer among the specific conditions for the first (and the third) pillar flexibility. A Member State can still refer an issue to the European Council for discussion, but the decision will be taken by QMV as opposed to unanimity.

There is also an important change regarding the role of the EP. Under the Article 11(2) of the ToN, the role of the Parliament was strengthened. In the ToA, the EP had only the right to be consulted in the first pillar. However, the Treaty Nice envisages the assent of the Parliament in an area covered by the procedure referred to in Article 251 (where co-decision applies). Hence, the EP was granted a role in approving the launch of enhanced cooperation in the first pillar.

The possibility of joining the mechanism, set with Article 11(a), adopts the same provision in Treaty of Amsterdam.

4.4.1.2.2 Second Pillar Specific Clauses

An important innovation with the Treaty of Nice is the expansion of the use of the mechanism to the second pillar. As it was mentioned in the previous chapter, second pillar was seen as an appropriate area for the implementation of flexible integration. However by the end of IGC 1996 negotiations, the issue was removed from the agenda. It remained as the example of case-by-case flexibility with the adoption of "constructive abstention".

Treaty of Nice sets the specific enabling clauses for the second pillar in Articles 27a to 27e. Article 27a states that enhanced cooperation in this pillar aims at safeguarding the values and serving the interests of the Union as a whole by asserting its identity as a coherent force on the international scene. According to Shaw, it is a tool for of governance aimed at efficiency rather than the promotion of closer cooperation (Shaw: 37).

Enhanced cooperation in second pillar covers a limited area. Article 27b explicitly indicated that enhanced cooperation now is allowed for the CFSP in order to implement a joint action or common position. However, it will not apply to matters having military or defence implications.

The procedure for establishing enhanced cooperation differs from the first and third pillars. Article 27c sets the procedure. Unlike pillar one and three, the role of the Commission is rather weak. Interested Member States address a request to the

Council. The Commission involves in the process by only giving an opinion on the issue. Since the second pillar is a more intergovernmental pillar, the Council rather than the Commission has the determining role. Within the process the EP is to be informed. The Secretary General/High Representative of the Council is given the role to ensure that the EP and all Member States, including the non-participants, are kept fully informed of the implementation of enhanced cooperation in this field.

The procedure is identical to CFSP procedure, which involves a qualified majority voting coupled with an emergency break. Qualified majority is foreseen for decision-making, under the same conditions as applied to Article 23 TEU. An emergency brake is set for the second pillar in the form of a reference to the European Council. Joining to the flexible arrangement is made possible with the Article 27e due to the openness principle.

Flexibility in second pillar is different than the arrangements in other two pillars, in terms of initiating mechanism, decision-making procedure and scope. According to Stubb "the new CFSP clauses should not even be called enhanced cooperation. The new clauses are more close to a form of implementation already agreed in principle by Member States.

4.4.1.2.3 Third Pillar Specific Clauses

Articles 40, 40a and 40b set the enabling clauses specific for the third pillar. The aim of enhanced cooperation in the third pillar is stated as "to develop more rapidly into an area of freedom, security and justice, while respecting the powers of the European Community and the objectives laid down in this Title" (Article 40). The reference to the speed of development of integration is rather interesting and is a point that differentiates the aim of enhanced cooperation from the ones in other pillars.

The Article 40 sets the specific conditions but they are not as extensive as those established for the first pillar. This illustrates that the negotiators were more concerned with preserving the unity of the first pillar than the unity of the third pillar (Stubb 2002: 131-132). Therefore, for the first pillar they introduced more stringent conditions for enhanced cooperation.

Trigger mechanism (Article 40a) is similar to the one in the first pillar. Although the role of the Commission is strengthened marginally with the Treaty of Nice with the right to initiative, it still exercises less power than it does in the first pillar. The Member States address their request to the Commission, which may submit a proposal to the Council. However, if the Commission refuses to submit a proposal, the initiative can than be taken by the Council. The removal of the emergency brake with Article 40a is one of the most important changes regarding the third pillar flexibility. The same article also states that disputes related to the third-pillar enabling clause, are to be resolved by the European Court of Justice.

Article 40b lays down the conditions for joining mechanism. As different from other pillars, instead of the Commission's approval, participating Member States will decide whether a non-participating Member State may join the mechanism (Stubb 2002:132). There is not a big problem of joining for the ones who choose to be "out". The problem is for the ones who are unable to be "in".

Table 4: Specific Conditions for Each Pillar

	First pillar (EC)	**Second pillar (CFSP)**	**Third pillar**
Authorization	Proposal from the Commission Consultation of EP If area concerned is covered by co-decision then assent of the EP QMV in Council	Opinion from Commission Information of EP Special QMV in Council of at least 10 states Possibility of transferral to European Council in view of unanimous decision	Proposal from Commission or initiative from at least eight member states Consultation of EP QMV in Council
Participation of other States	Opinion from Commission to Council But Commission decides	Opinion from Commission QMV among participating states	Opinion from Commission QMV among participating states

Source: Laursen

4.4.2 Case-by-case Flexibility

This mode of integration has been envisaged for the second pillar and was added into to the TEU with the Treaty of Amsterdam. Although the Treaty of Nice adopted enabling clauses also for the second pillar for a limited field of CFSP, Article 23 TEU (Amsterdam J.13) that introduced "constructive abstention" remained.[25] The only difference is the removal of the clause that sets the appointment of a special representative in accordance with Article 18(5) with the act of Council acting by qualified majority.

Case-by-case flexibility is radically different from the enabling clauses in that it is more of a decision-making mechanism than a form of flexibility. It allows a number of Member States -from one to three- to abstain from a given decision in the second pillar. No IGC decision is required and the Member States can decide, on a case-by-case basis, the areas in which they want to pursue different objectives (Stubb 2002: 143).

4.4.3 Pre-determined Flexibility

Pre-determined flexibility was established in protocols and declarations in the Treaty of Amsterdam. Pre-defined flexibility revolves around special arrangements for Member States that find it difficult, usually for political reasons, to participate fully in a given area (Stubb 2002: 135).

Protocols No. 2 integrating the Shengen *acquis* into the framework of the EU, Protocol No. 3 on the application of certain aspects of article 14 of the TEC to the UK and Ireland, Protocol No. 4 on the position of the UK and Ireland in the new title IV on visas, asylum, immigration and other policies related to the free movement of persons, and Protocol No. 5 on the position of Denmark in Schengen and the new title IV are the examples that form pre-determined flexibility. The provisions are dealt with later in the IGCs, therefore, they ended up being legally complex. There was a poor coordination between the negotiations on the new title IV on visas, asylum, immigration and other policies relating to the free movement of persons, the

[25] For the details of the Article see previous chapter, "case-by-case flexibility" (p.90)

Schengen protocol and the provisions related to the UK, Ireland and Denmark (Stubb 2002: 135).

There is no addition to pre-determined flexibility in the Treaty of Nice, therefore only reference to the previous chapter for detailed information on these protocols will be made here.

4.5 The Assessment of the Provisions of the Treaty of Nice Regarding Flexible Integration

The assessment of the provisions on closer cooperation introduced by the ToN is not easy since the provisions have not yet been implemented. David Galloway describes the IGC as finding itself "*in the somewhat surreal position of considering amendments to treaty provisions which had never been used, to deal with situations which could not be clearly identified and for no clearly defined objective*" (Galloway 2001: p.133).

There have been speculations on the areas to which the provisions on closer cooperation might apply. The Commission already mentioned some issues to be immune from flexibility, namely issues falling under the exclusive competence. A large number issues, on the other hand, were left open to closer cooperation such as border controls, asylum and immigration, macroeconomic management, tax economic policy, employment and social policy, customs cooperation, education, vocational training, youth, culture, public health, consumer protection, environment, industry, research and development, trans-European networks…(Gillespie 2001: 8; Brown 2002: 16). According to Philippart, for those areas, closer cooperation can now function as a "laboratory" for the EU (Philippart 2001).

The discussions on flexibility were focused mainly on four issues; the removal of the 'emergency brake' or veto, the reduction of the number of states required initiating enhanced cooperation, relaxation of the very strict enabling clauses and the possibility of flexibility in the second pillar.

The general scheme almost stayed the same as established by the Treaty of Amsterdam. The objectives of such cooperation laid down in Amsterdam -respecting the single institutional framework, the *acquis* and the founding Treaties- remained the same. The number of Member States required to trigger the mechanism was reduced to 8, from the requirement of a majority of the Member States under the Treaty of Amsterdam. The 'emergency brake', which allowed Member States to veto the use of the mechanism, was abolished (First and Third Pillars). An important innovation with the Treaty of Nice is the expansion of the use of the mechanism to the second pillar. Enhanced cooperation now is allowed for the CFSP in order to implement a joint action or a common position. However, it will not apply to matters having military or defence implications.

Some of the earlier points of criticism raised at the time of the Treaty of Amsterdam were removed with the amendments mentioned above. In general, the provisions of the Treaty of Nice were assessed as being reasonable, operational, fairly well-balanced (Philippart 2001; Gray and Stubb 2000: 17; Yataganas: 48; Gillespie 2001: 87). However there are still some issues to be criticised. According to Dehousse and Grevi, Treaty of Nice could not manage to loosen the general conditionality imposed on enhanced cooperation, it only simplified procedures for its the implementation (Dehousse and Grevi 2004: 10).

Political nature of the provisions was already subject to criticism in Treaty of Amsterdam (Edwards and Philppart 1997, 1999; Ehlermann 1997) and the Treaty of Nice did not do much to overcome this problem. It is also the case for the complexity of the system. Different forms of flexible integration, general enabling clauses accompanied with the specific enabling clauses for each pillar makes it even more complex. With the ToN, flexibility mechanism was made possible for the second pillar as well. However, a different form of flexible arrangements other than first and third pillars was envisaged for this pillar. Offering a third set of variables make the flexibility clauses more complex (Shaw: 37).

Another criticism can be brought in terms of the absence of the catch-up mechanism. The same critique had earlier existed for the Amsterdam provisions (Edwards and

Philippart 1997: 14; 1999: 92). Combined with the persistent absence of such mechanism, the lowering of the participation threshold could undermine the principle of the single institutional framework. According to Philippart, fragmentation induced by closer cooperation remains the main danger for the current EU model of governance (Phillipart 2001).

However, without such a mechanism, some Member States could still form international cooperation not within the framework of the Union but outside of it. Similar fears also appeared in the earlier debates on flexible integartion. However,rather than increasing the fragmentation in the Union they operated like a locomotive that pulls on board the latecomers (Yataganas 2001: 48). Enhanced cooperation may have the same effect, especially in an enlarged Union.

The aim of the mechanism is to make the Union move forward in an enlarged form. In an increasingly diverse Union the use of flexible mechanism will increase. Since the extension of QMV was difficult to achieve during the IGC, flexibility was perceived as an alternative to a more widespread use of QMV (Dinan and Vanhoanacker 2000-2001). However it is not a substitute or alternative for the qualified majority voting (Stubb 2000: 155) but it does constitute a tool for further integration on issues blocked by the veto of Member States.

Edwards and Philippart assessed the general flexibility clauses as an example of multi-speed type of differentiated integration since closer cooperation if open to all members. However as Stubb puts it correctly, the aim is not the same, nor all Member States would join cooperation at a later stage. Therefore, it is more like an example of variable geometry. They allow a limited number of willing and able member states to pursue further integration within the institutional framework of the Union, but they do not allow a permanent or irreversible separation between a hard core and lesser-developed integrative units (Stubb 2002: 132-133).

4.6 Conclusion

Provisions on enhanced cooperation in the Treaty of Nice have provided a more operational framework than the Treaty of Amsterdam. However, there are still some issues to be discussed. While criticising the provisions one should not forget that the issue of enhanced cooperation is not just a technical issue or just a procedural method of decision-making. The issue of flexibility is closely linked to a wider debate on the future of European integration.

Another point to be emphasized is the nature of the IGCs. During the IGCs, different perspectives on the integration process are reflected in the discussions. The outcome of these IGCs, -the Treaties- are the result of bargaining processes and messy mixtures of intergovernmentalism and supranationalism. The IGC 2000 also reflects both the desire of those who want to go further and the wish of the German Lander and some British opinion to prevent further loss of autonomy by enshrining a (restrictive) list of EU powers (Church 2002: 60). The provisions on closer cooperation should be assessed in light of the wider debate and the nature of the IGCs. Within this context, the mechanism can be perceived as an attempt to give an enlarged European Union a range of instruments to manage diversity, an insurance policy as Galloway puts it (Galloway 2001: p.140).

Flexibility is used as an exception more than the rule in the Union. However, it has been one of the "sexiest subjects" in the Union because it appeals to very different political constituencies among the Member States. Overtime there has been a gradual shift from an early, rather one-dimensional form of differentiated integration towards a somewhat more complex, or multifaceted set of models. Within a more heterogeneous and large Union, the use of the flexible mechanism might determine the new direction of future integration. The Treaty of Nice provided the framework in which further integration can take place. The political will of the Member States is the determinant for the realization of this mechanism in practice. However, the Treaty of Nice is not the end of evolution for the Union. The Post-Nice agenda, mainly shaped with constitutional issues indicates that integration is an ongoing-process. Although the issue of closer cooperation has not been an issue on the agenda

for the new IGC, it is a part of the wider debate of the “future of Europe” and the constitution.

CHAPTER 5:

POST-NICE DEVELOPMENTS

The provisions on enhanced cooperation were subject to change within the process of Constitutionalisation. As it is mentioned before in this study, flexible integration is an evolving concept within the Union. The Constitution for Europe, which gives a new shape to the Union as a whole, has also dealt with enhanced cooperation clauses. However, instead of taking the Treaty of Nice clauses, the Constitution has amended the provisions. Therefore, these clauses, without being used, have been subject to amendments with the European Convention and the IGC 2003/2004. The draft Constitution for Europe, which was produced by the Convention brings new arrangements for flexible integration.

This chapter aims to examine how the issue of flexibility has taken place within the process of Constitutionalisation. A brief summary will be given on the Convention and the IGC 2003/2004 which prepared the Constitution in order to understand the process.

Although there was no specific working group on the issue of flexibility during the working period of the Convention, the issue was discussed in some sessions, such as during the meetings regarding defence issues or justice and home affairs. The outcome of this process, the provisions on enhanced cooperation will also be assessed.

5.1 After the Treaty of Nice

The Treaty of Nice was signed in December 2000. It has been gone through a long ratification process before it entered into force like all other Treaties of the Union. The "No" answer in the referendum of June 2001 in Ireland created fears that the integration process will be deadlocked. Without the ratification of the Treaty by all the signatories the Treaty could not came into force. It was only after the second referendum in October 2002 that the Treaty could enter into force on 1 February 2003.

However, the process of Constituionalisation was already underway. Final text of the Declaration on the Future of the Union stated that important reforms have been decided in Nice and, a new IGC Summit will be convened in 2004 to make the necessary changes in the treaties. Main issues to be dealt with were set as subsidiarity, Charter of Fundamental Rights, simplification of the treaties, and the role of national parliaments.

Even before the entry into force of the Treaty of Nice, Laeken European Summit of 14-15 December 2001 called for the establishment of a Convention in order to ensure that the preparations of the forthcoming IGC would be as broadly-based and transparent as possible (European Council 2001:2). Preparations of the previous IGCs have been conducted by wisemen groups or the so-called reflection groups, whereas for the IGC 2003/2004 a "Convention" with the participation of all candidates countries, has been preferred. In parallel with the proceedings of the Convention, a Forum was set to make it possible to give structure to and broaden the public debate on the future of the Union.

The Laeken Declaration marks an important stage for setting the future of the Union. It initiated the Constitutionalisation process within the EU. However, the issue of flexible integration was not mentioned in the Declaration. Probably at that stage the Constitution itself was the major issue on the agenda of the Union. At a time when the Union was seeking for transforming its structure towards uniformity by drafting a Constitution, the tool for differentiation was not spelled out in the Declaration.

5.2 The European Convention

The European Convention was set up on 28 February 2002. It was composed of 16 members from the EP, 32 from national parliaments, 15 from the national governments, and two from the Commission. The applicants, including Turkey, were represented with 26 members from their national parliaments and 13 from their governments.

The Convention was led by Giscard d'Estaing as the President and the former Italian Prime Minister Guliano Amato and former Belgian Prime Minister Jean-Luc Dehane as the Vice-Presidents. Giscard d'Estaing also chaired the Convention Praesidium, which set the agenda, drew up conclusions, and established Convention working groups.

The Convention established 11 working groups to deal with the main issues concerning the future of the EU. The task of these working groups was to prepare recommendations on the issues. Workings groups were on subsidiarity, Charter of Fundamental Rights, legal personality, national parliaments, complementary competences, economic governance, external action, defence, simplification of procedures and instruments, freedom, security and justice, and social Europe.

There was no working group specifically assigned to discuss and draft provisions on flexibility. However the issue has been debated in the corridors. According to Grevi, the reason for that was that the leaders at the European and national levels clearly felt that it would have been inappropriate to openly discuss differentiation when a common institutional framework for the Union was sought (Grevi 2004: 49).

During the Convention there was a consensus among all participants that enhanced cooperation should be open to all Member States who would like to join at a later stage (Report on the Convention Newsletter 2003). Regarding the threshold for initiating enhanced cooperation different views prevailed. The Prasedium's proposal for the minimum number of participating states was the 1/3 of the Member States. However, during the Convention the possibility of setting the number for threshold

as the 1/2 of Member States was also spelled out by some Member States such as Sweden, Finland and Ireland. The debate revolved around theoretical assumptions that the representative of Sweden argued if the level was set at 1/3 it would be possible to have two groups making enhanced cooperation within the same area. However, this was countered by the Italian delegation by saying that initiating an enhanced cooperation would always require a majority in the Council and that there would never be a majority for two groups that initiate an enhanced cooperation (Report on the Convention Newsletter 2003).

There were also some critical voices against the enhanced cooperation mechanism as a whole. The reasons were, either that the mechanism would weaken Europe or it is against the whole idea of the Union (Report on the Convention Newsletter 2003). The scepticism of the applicant countries towards the mechanism was visible. Their fear was to be left out from such cooperation due to their lack of capacity and such cooperation would lead to a fragmentation in the Union with the creation of a structured discrimination against the medium and smaller Member States (Su 2004: 20). The reservations of the Eastern European countries were more obvious in the field of defence. There was a general opposition towards the establishment of an enhanced cooperation in the field of defence. The words that were pronounced by these Member States were mostly about the solidarity and openness (Su 2004: 20).

Besides discussions on the provisions on enhanced cooperation, flexible integration did not constitute a major part in the discussions during the Convention. However, according to Barbier, Convention working groups gave the impression that this mechanism might be applied to police and judicial co-operation in criminal matters as well as to the common foreign and security policy (Barbier 2004 Feb: 3).

In terms of defence, a well-known Franco-German proposal in November 2002 contributed to the debate. In this paper France and Germany advocated the creation of a pioneer group in defence policy, somewhat loosely related to the Treaty framework through a Protocol (CONV 422/02). According to Grevi, this design has led to the formulation of ‘structured cooperation’ in the Constitutional Treaty (Grevi 2004: 44).

The Working Group VIII on defence, recommended at its final report of 16 December 2002;

> to ensure flexibility in decision-making and in action, both through more extensive use of constructive abstention and through the setting-up of a specific form of closer cooperation between those Member States wishing to carry out the most demanding Petersberg tasks and having the capabilities needed for that commitment to be credible (CONV 461/02: 2).

The issue was also discussed within the Working Group X of "Freedom, Security and Justice". Their final report made reference to the mechanisms of opt-outs, opt-ins and re-inforced cooperation. According to the Group, the question was also whether and how the use of opting-in or opting-out arrangements will be regulated in the future. They consider that this should be examined by the Convention in more general (CONV 426/02: 24). Another Franco-German contribution was made on the area of freedom, security and justice. Fischer and de Villepin referred to the procedure in the field of police co-operation (CONV 435/02).

The text, proposal of the Convention, was presented by Giscard d'Estaing to the heads of governments and states at the Thessaloniki Summit of 20-21 June 2003. Closer cooperation was not an issue on the agenda. The Presidency Conclusion assessed the presentation of the Draft Treaty as a historic step in the direction of furthering the objectives of European integration which are:
- bringing the Union closer to its citizens,
- strengthening the Union's democratic character,
- facilitating the Union's capacity to make decisions, especially after its enlargement,
- enhancing the Union's ability to act as a coherent and unified force in the international
system, and
- effectively dealing with the challenges globalisation and interdependence (European Council 2003a:1).

With the presentation of the Draft Constitutional Treaty, the task of the Convention has been completed. This Draft has been set as the basis for the forthcoming IGC. The Presidency Conclusion also envisaged the completion of the work of IGC and

agreement on the Constitutional Treaty before the June 2004 EP elections. The signing of the Constitutional Treaty was anticipated after May 2004 after the forthcoming round of enlargement (European Council 2003a: 2).

5.3 IGC 2003/2004

The IGC 2003/2004 is different from the previous ones. It has been preceded by a Convention which has identified and has come forward with recommendations on the key issues arising for the Union's future development.

The IGC 2003-2004 was opened in Rome on 4 October, at a meeting of Heads of State or Government. The Constitution was submitted to the Heads of State and Government in the opening of the Intergovernmental Conference. The principal task of the IGC was set as drawing-up and adopting of the final version of the EU's first constitution. Several Member States have called for changes to the draft EU Constitution proposed by the European Convention in July. It was envisaged that the IGC should reach an agreement before the next elections for the European Parliament, planned for June 2004 (European Convention, Official Website).

The IGC 2003/2004 was marked with the crisis it faced. At the Brussels European Council of 12-13 December 2003, Member States were unable to adopt the new Constitution and the future of the Union and the Constitution had faced a deadlock. The Presidency Conclusion stated that it was not possible for the Intergovernmental Conference to reach an overall agreement on a draft constitutional treaty at this stage. The Irish Presidency was requested on the basis of consultations to make an assessment of the prospects for progress and to report to the European Council in March (European Council 2003b: 1)

The repercussions of the failure were drastic. Almost all prominent newspapers, websites regarding the EU issues commented on the issue. Collapse of the constitutional talks served for the revitalization of the debate on flexible integration. According to Grevi, the sudden interruption of talks on the Constitution led to more

emphasis on the need for flexible integration (Grevi 2004: 15). This was made clearer by the speeches of some leaders, in particular by Chirac and Shröeder.

For example J. Chirac commented that, he wanted to see a “pioneer group” of countries to push the integration ahead. This group would provide an engine, an example that would allow Europe to go faster, further and better (BBC News, 13 December 2003, The New York Times, 14 December 2003, The Washington Times, 14 December 2003). Chancellor G. Schröeder also stressed that “if we do not reach a consensus in the foreseeable future, a two-speed Europe will emerge.” (The Guardian, 15 December 2003).

According to Lobjakas, Germany and France may have planned the failure. The failure would unveil their plans to forge ahead with a "core group". The idea was apparently discussed at a dinner on 12 December night with the participation of Schroeder, Chirac, and Belgian Prime Minister Guy Verhofstadt (Lobjakas 2003).

After the failure in December, the leaders of France, Germany and the UK met in Berlin on 18 February 2004 to formulate a common position for the forthcoming European Council in March. The big three reached an agreement on defence that was purely on intergovernmental basis. This common proposal of the Member States met by scepticism by some. This was perceived as an attempt to create a ”directorate” of the three, which would be the vanguard in an enlarged Union (Barbier, 2004 Feb: 1). The Italian Prime Minister responded that there could not be a directoire, a decisive nucleus which would run the risk of posing a threat to European integration (quoted in Grevi 2004: 45).

Grevi, however pulls the attention to the changing discourse of the Member States which can be envisaged in the speeches of the Member States after the common position mentioned above. Chirac at his speech at the Hungarian Parliament on 24 February envisaged only a limited scope for open and inclusive forms of flexibility. The interview given to Berliner Zeitung on the 27 February by Fischer denoted a more major change in German discourse on flexibility. He stated that the “centre of gravity” formula that he coined four years ago would not be adequate for the Union, which aims to become a strong international actor. Forms of closer cooperation could

be used occasionally, but should not undermine the unity of a Europe of 25 (Grevi 2004: 45).

According to Grevi, the reason for the change in the discourse of the Member States was the close date of the Eastern enlargement. Before, the debate on flexibility had been rather theoretical since the Member States did not feel the real pressure of enlargement. Another reason could be the sceptical approach of the applicant states towards flexible integration during the Convention. In particular after the collapse of the talks in Brussels in December, France and Germany might have tried to give the guarantee of unity of the Union with 25 Member States although they envisage the use of flexible integration mechanisms.

At the following European Council in Brussels in March 2004 there was still no consensus on the Constitution. The Intergovermental Conference Report by the Irish Presidency to European Council 25/26 March 2004 stated that it was not possible for the IGC to reach an overall agreement on a draft Constitutional Treaty at that stage. The most difficult issues remained the size and the composition of the Commission and in particular the definition and the scope of QMV. The minimum seat threshold in the European Parliament also remained to be settled (Irish Presidency 2004:1). The European Council welcomed the Presidency's report and its assessment of the prospect for progress. It reaffirmed its commitment for reaching agreement on the Constitutional Treaty, and requested the Presidency to continue its consultations and as soon as appropriate to arrange the resumption of formal negotiations in the IGC. It was envisaged that the agreement on the Constitutional Treaty should be reached no later than the June European Council (European Council 2004a: 2).

Following the decision taken by the European Council in March, the final agreement was reached in June in another Brussels European Council.

5.4 The Outcome

At the meeting on 18 June 2004 Heads of State or Government, Member States gave their approval to the final text of Constitutional Treaty (European Council 2004b).

The constitution is divided into four parts: Part I is the Objectives, values, institutions, competence, finances, etc. of the Union; Part II is Charter of Fundamental Right, Part III is the Policies and Functioning of the Union which assembles and amends the present EU and EC Treaties, Part IV is the General and Final provisions

The new constitution contains over 400 articles, introduces big innovations:

- EU getting a permanent chair of the European Council, a new EU foreign minister
- Double majority system of both member states and population
- Reducing the number of Commissioners to two thirds of the number of Member States for 2014
- The powers of the EP has been strengthened,
- Exit clause

Enhanced cooperation is first spelled out under the Part I, Title V "Exercise of Union Competence" along with Common Provisions and Specific Provisions. With Article 43 enhanced cooperation is set as a tool for exercising the Union's competences. The detailed provisions on enhanced cooperation are laid down under Part III "The Policies and Functioning of the Union", Title VI "The Functioning of the Union" Chapter III. The most important innovation of the Constitution in terms of enhanced cooperation clauses is the abolishment of pillar structure. Enabling clauses for all pillars are set with Chapter III. The only exception is the area of defence with some specific provisions under Chapter II common foreign and security policy.

5.4.1 Enhanced Cooperation under Part I, Title V, Chapter III

Article 43 provides the general principles for enhanced cooperation. The details of the mechanism, the procedural and financial aspects are left to Part III.

Article 43 provides the basis for the establishment of enhanced cooperation. This cooperation can be realised only within the framework of the Union's non-exclusive competences. Therefore, it does not enable any action in matters for which the Treaty does not already provide a legal basis. Moreover, enhanced cooperation should aim at furthering the objectives of the Union, protect its interests and reinforce its integration process.

The openness and inclusiveness principles were stated in this part by stating that such cooperation should be open to all Member States, when it is established and at any time. In terms of inclusiveness the article states that all Member States take part in the deliberations of enhanced cooperation although only the Member States who participate in such cooperation are entitled to take part in the adoption of acts.

The last resort condition is preserved that the authorisation by the Council of Ministers could be granted if the objectives of such cooperation could not be attained within a reasonable period of time by the Union as a whole.

An important amendment was brought in terms of the critical mass. Following the proposal of the Prasesidium, the number of Member States which is required to initiate the mechanism was set as "one third" of Member States. The threshold was determined as eight with the Treaty of Nice. If one considers the number of Member States with the new enlargement and the forthcoming ones as well, the triggering mechanism has become harder. One can argue that this clause serves for the interest of Members States which have the fear of being left out due to the lack of capacity or/and the other who are capable but unwilling to pursue a deeper integration in such areas. This clause could easily prevent the creation of a core. However, it can also be seen as a step backwards. The raising number of minimum threshold with forthcoming enlargements will make it difficult to activate the mechanism. According to Dehousse and Coussens, the gatekeeper roles of the EU institutions in terms of authorisation and ensuring the consistency of such cooperation with the polices of the Union and also the relative openness of enhanced cooperation are sufficient to limit the emergence of cores within the Union (Dehousse and Cousses 2004: 14).

Article 43 defines also the unanimity and qualified majority in terms of the use of enhanced cooperation.

5.4.2 Enhanced Cooperation under Part III, Title VI, Chapter III

Articles III-322 serves for the preservation of uniformity in the Union. It states that any enhanced cooperation should comply with the Union's Constitution and law and adds that it should not undermine the internal market or economic, social and territorial cohesion. Such cooperation moreover, should not constitute a barrier to or discrimination in trade between Member States, and should not distort competition between them.

According to Dehousse and Coussens , in some cases the use of flexible integration will not undermine the internal market but on the contrary will serve for the improvement of its functioning. For example enhanced cooperation in the field of taxation can be achieved, such cooperation will eliminate the detrimental effects of heterogeneity of tax systems on the functioning of internal market (Dehousse and Coussens 2004: 21-22) .

With Article III-323 respect to competences, rights and obligations of the non-participating members is ensured. However, this provision also brings liabilities to the non-participating members that they should not impede the implementation of such cooperation.

Article III-324 repeats the openness clause which is already stated in Part I. The openness clause is however laid down different than the one in Treaty of Nice. It spells out the openness both in the initiation of the mechanism and later at any other time. At both times, compliance with the conditions of participation is required. Therefore, after the entry into force of the Constitution, there would be a "conditional initial participation" and the initial participation would no longer merely depend on the simple will of the Member States but also on their capacity to participate (Dehousse and Coussens 2004: 13).

Article II-325 sets the procedures for the application and the authorisation of enhanced cooperation. A different method is adopted for the area of common foreign and security policy. For all the constitutional areas other than CFSP, the request is directed to the Commission. This request specifies the scope and the objectives of the envisaged cooperation. The Commission has the responsibility to submit to the Council, or to reject the request. In the field of CFSP, this responsibility belongs to the Council of Ministers. For this field, the opinions of the Minister of Foreign Affairs and the Commission are requested. The request is forwarded to the EP as well, but only for information, whereas in all other areas, the consent of the EP is obliged. In terms of the authorisation Council of Ministers is the only institution that could grant it in all areas.

The differentiation between all the constitutional areas and CFSP was also made in terms of a request of participating at a later stage as the responsible EU institutions for these areas differ. In general, the Commission and the Council of Ministers are involved in these process, but the Union Minister of Foreign Affairs is also added to the process for the area of CFSP.

The Commission and the Council of Ministers are rendered the role of ensuring the consistency of the activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of Union. And the financial aspects of the mechanism remained the same as the Treaty of Nice provisions.

The Constitution has adopted a new, important provision by Article III-328. By the new provision, the Council of Ministers, by acting unanimously, can decide to act by qualified majority or/and act under the ordinary legislative procedure where the Treaty still envisaged unanimity and special legislative procedures. This clause is named as “passerelle clause” and was introduced during the Convention. However, the Italian Presidency just before the Brussels European Council of December 2003, decided to abandon the passerelle procedure due to the pressure coming form the national governments (Italian Presidency 2003). The removal of this clause had been criticised by many authors (Grevi 2004, Dehousse and Coussens 2004). It was back on the final draft of the Constitution.

5.4.3 Specific Conditions under Common Security and Defence Policy

Specific provisions are laid down in respect of the CFSP. Article III-213 envisages a "Structured cooperation" for the field of defence. In accordance with the new provisions, some Member States which fulfil higher military criteria and wish to engage upon more demanding military tasks can establish a structured cooperation. This structured cooperation is not bound with the conditions envisaged in Chapter III. Such cooperation will be shaped by a Protocol. The Protocol will set the military capacity criteria and commitments.

Structured cooperation is open to all Member States, on the approval of the Member States already involved. Therefore, only the participating Member States of structured cooperation will participate in the voting for joining of another Member State. Participating Member States will participate in all deliberations and the adoption of decisions. Other member states are going to be informed only.

5.5 Are the New Provisions Satisfactory ?

Preparations of a fundamental reform in the Union started in February 2002 and finished around 16 months later. The Convention on the Future of Europe has produced the EU Constitution, which replaces the existing EU and EC Treaties. This was followed by the work of the IGC on the issue. Although the IGC, and the Constitution faced a major challenge with the collapse of the talks in Brussels European Summit, Members States at the Brussels European Council of 18 June 2004 eventually agreed on the new Constitution. The Treaty establishing a Constitution for Europe will be signed under the Dutch Presidency on 29 October 2004 in Rome. This will be followed by a long and difficult ratification process. The document, than has to be ratified by 25 Member States within a two years time. While most of the countries will ratify the treaty through a parliamentary process, a number of countries already announced that they would hold a referendum such as Denmark, the UK, Ireland, Luxemburg, Poland, Spain, the Netherlands, Belgium, and France. If one considers the difficult referendum process in Ireland for the

ratification of the Treaty of Nice in 2001, it obvious that the Union will face a hard time.

What will happen if the Union could not succeed in ratifying the Constitution is another question. However, with the entry into force of the Constitution the new provisions on enhanced cooperation will prevail. The most important novelty of the Constitution in terms of enhanced cooperation is the abolition of the pillar structure. Enabling clauses were set for all pillars with the exception of the area of defence. The new arrangement will meet the criticism that was raised in terms of the existence of different modes for each pillar. Previous Treaties envisaged different conditions and procedures for each pillar. This was criticised since this would have make the institutional structure of the Union even more complex. With the Constitution, however, this criticism has been met. According to Dehousse and Coussens the use flexible integration in this domain may bring significant benefits to the Union's external identity, may prevent a mechanism outside of the Treaty framework (Dehousse and Coussens 2004:23).

One of the primary achievements of the Constitution has been the adoption of enhanced cooperation in this field under "structured cooperation". In the Treaties of Amsterdam and Nice, the domain of defence was left outside of the scope of enhanced cooperation. The area of defence is not excluded from the Constitution but a different model of closer cooperation is envisaged. Due to its nature and the existence of broad differences in national preferences, this area would still be strongly intergovernmental. That is why, special provisions are envisaged for this domain.

Another positive step forward taken by the Constitution is in the area of CFSP. With the new provisions, the scope of enhanced cooperation is extended to the entire foreign and defence policy, therefore, such mechanism is no longer restricted to the mere implementation of a joint action or a common position.

Despite these positive steps taken forward by the Constitution, there still exist some points of criticism. For example number of Member States necessitated for the

initiation of the mechanism can be perceived as a step backwards as this number will increase with the forthcoming enlargements. The Constitutional Treaty does not modify the substantive conditionality of enhanced cooperation much, but the procedural provisions and its scope have been substantially reformed.

CHAPTER 6

CONCLUSION

Flexibility is an evolving concept within the European Union. The Union used several different versions of differentiated integration before and after the mechanism was legally established within the Treaties. Divergence of practices and differences in approach also led to confusion in its conceptualisation. After scrutinising the conceptualisation of the issue, this study comes to the conclusion that "which model of flexible integration is best for the Union?" is not the crucial question to be asked for several reasons. First, meanings and characteristics of different modes of flexibility differ from one scholar to another and differences between the concepts are not clear-cut. Second, a practical example of differentiated integration might convey the characteristics of different modes of flexible integration as it was explained in the example of the EMU. Third, all these modes have their examples in the history of the EU. Overtime, as a result of the expansion of policies and successive enlargements, the Union adopted different types of the decision-making procedures and structures. In the first pillar, the community method prevails, whereas in the second and the third pillars a more intergovernmental approach is utilised. Therefore, the type of decision-making in the latter two differs from the first pillar. Decision-making reflects the nature of the union; which is a mixture of supranationalism and intergovernmentalism. Differences in the natures of the pillars are also reflected with flexibility. Accordingly, different modes of flexible integration are envisaged for different pillars.

There have been many different approaches to the mechanism. For some of the Member States it has been a tool to opt-out from the policies in which they do not want to participate. Deepening has not always been welcomed by all Member States.

Some Member States have opposed the expansion of some policies due to strong attachment to their national sovereignty. Examples of these have been presented through discussions of the EMU, Schengen, and Social Policy with the opt-outs of some Member States, such as the UK, Sweden, and Denmark. However, flexibility worked for the initiation of new policies, excluding some Member States based on their national preferences. Rather than opposing the policy as a whole, and preventing it to be implemented, the "reluctant" Member States could stay outside of these policies with the flexibility mechanisms, while letting the willing ones further cooperate among themselves.

Due to the lack of capacity, the willing but unable Member States could be an obstacle against deeper integration in certain areas. The mechanism of flexible integration also serves to overcome this threat. This arrangement comes with the guarantee, given to the laggards, that they can be included in the mechanism once they fulfil the necessary criteria.

For another group of Member States who are willing to go further, but hindered by the reluctant ones, flexibility serves as a way to by-pass these unwilling Member States. It has been a device to remove opposition within the Union. Flexibility has been an important tool to reconcile different goals and to move ahead. For unwilling Member States rather than opposing policies, it gives the opportunity to opt out from a policy area. At the same time the willing ones can further integrate without harming the Community *acquis* and the institutional framework of the Union.

The mechanism, therefore could be seen as a magical solution to merge the different positions and interests of Member States; a mechanism to achieve both widening and deepening at the same time. If this is so, then why are there many people who are critical about the issue? The answer is, that apart from all the advantages the mechanism provides, it also possesses many risks. The fear of unwilling and incapable Member States is that the mechanism will lead to fragmentation and creation of a hard-core within the Union. The creation of a hard-core will result in a permanent gap between this core and the laggards which would not be lessened but increased in the future. Past examples have proven the opposite. As it can be seen

with the Schengen Agreement, such cooperation, which had been initiated outside of the Treaty framework, was then incorporated into the Treaties and has become a part of the EU. An existing mechanism of closer cooperation, therefore, could also be transformed into another form of differentiated integration.

The example of EMU cannot be perceived as an element of disintegration either. Although three Member States, the UK, Ireland and Sweden- are excluded from the EMU based on their own preferences, the Euro is associated with the European Union as an enduring feature in the eyes of people. The EMU, an example of differentiated integration, also proves that joining is possible at a later stage. Greece, which joined the third stage of the EMU two years after the initial participants, can be seen as an example. Concerns regarding the formation of a permanent discrimination due to the creation of a hard-core could be met with the example of EMU.

The past examples illustrate that different models of differentiated integration have been exercised in different policy areas depending on the nature of that domain. The hesitations of reluctant Member States that the mechanism would harm the unity of the Union were also met by introducing conditions and guarantees into the Treaties. The Treaty of Amsterdam of 1997, which has legally defined the mechanism as "closer cooperation", is the most stringent one in terms of the conditions to be met for its implementation. This was the result of understandable fears and deep concerns that the mechanism would lead to fragmentation. The enabling clauses, which set the conditions of closer cooperation for the first and third pillars, with some differentiations were almost impossible to be realized in practice. The conditions, the right to veto due to an important reason of national policy, the cumbersome triggering mechanism with the need of majority of Member States limited the practice of mechanism. For the second pillar, the so-called constructive abstention was adopted instead of a clear closer cooperation.

The Treaty of Amsterdam, however, should be considered as a single step in the evolution of the mechanism. This step should not be underestimated, since it led to the formalisation of the flexible integration. The evolution of the mechanism

continued with the successive Treaties. The issue was back on the agenda with the IGC 2000. The aim was to make flexibility clauses, which were quite stringent, "more flexible". The outcome was positive with more operational clauses. With the new provisions named as "enhanced cooperation" instead of closer cooperation, the right to veto, the so-called "emergency brake" was removed, the number of states required initiating enhanced cooperation was reduced and flexibility in the second pillar, although limited, was made possible. The Constitution for Europe of 2004 took a further step and abolished the pillar structure for differentiated integration. The Constitution also extended the use of enhanced cooperation in the second pillar.

Envisaging different flexible integration mechanisms for different policy areas was perceived as one of the drawbacks of the enhanced cooperation mechanism, since it would add to the complexity of the EU structure. The Union requires more transparency in order to prove its legitimacy in the eyes of its citizens. This risk of complexity was addressed by the Constitution through the abolition of the pillar structure.

The mechanism has not been used since its institutionalisation by the Treaty of Amsterdam. The provisions, which had not been exercised, have already been subject to adaptations. Therefore, the debate on the provisions of enhanced cooperation has been theoretical. The aim of these amendments has been to evolve the mechanism in a way, which fulfils the expectations of both groups of member states, willing and hesitant ones. The provisions should pave the way to enable the Member States who would like to pursue further integration in a certain field, while guaranteeing the cohesion of the Union and ensuring the Union's integrity.

Theoretically the Treaties provide the legal basis to set enhanced cooperation in motion. However, its use will be the determining element. The provisions in the Constitution guarantee the uniformity of the EU policies with the general conditions aiming at furthering the objectives of the Union and protecting its interests. The provisions also state that such cooperation should not undermine internal market, economic, social and territorial cohesion, and should not constitute a barrier to or discrimination of trade. In addition to these general principles, the clauses also

provide the openness and the inclusiveness of the mechanism. The role of the Commission and the European Council would be of most importance in terms of scrutinizing the cohesion of policies. With these clauses, the fears of the new Member States can be met. Flexible integration can become a tool to reconcile different approaches in the Union without harming the unity of the Union. Flexible integration can serve as a vehicle to reconcile the legitimate diversity of capabilities, interests and preferences in a larger Union.

The actual test of these provisions will be realised when there is an initiative to trigger the mechanism. Answers will be found to the questions of whether the clauses provide an adequate basis for enabling the mechanism or if they are too stringent. The Union will go through another incremental learning process with the implementation of these clauses in practice. One should not forget that the concept is still evolving; inevitably, it will take shape in line with the development of the Union.

REFERENCES

PRELIMINARY RESOURCES

1. Commission (1995a) Report of 10 May 1995 on the operation of the Treaty on European Union.

2. Commission (2000a) Adapting the Institutions to Make a Success of Enlargement, Opinion, Commission Opinion in accordance with Article 48 of the Treaty on European Union on the calling of a Conference of Representatives of the Governments of the Member States to amend the Treaties, COM (2000) 34, Brussles, 26 January.

3. Commission (2000b) *Additional Commission contribution to the Intergovernmental Conference on institutional reform, Reform of the Community courts*, COM (2000) 608 final IP/00/213 Brussels, 1 March.

4. CONF 2500/96, Outline for a Draft Revision of the Treaties, Irish Presidency 13-14 December.

5. CONF 2500 ADD1/97, Addendum to Irish Draft Treaty, 20 March.

6. CONFER 4750/00- Presidency report on the Intergovernmental Conference submitted to the Santa Maria da Feira European Council, 19-20 June.

7. CONFER 4758/00, Closer cooperation, 11 July.

8. CONFER 4765/00 Belgian Position, 28 August.

9. CONFER 4766/00, Closer cooperation, 30 August.

10. CONFER 4780/00, Closer cooperation, 5 October.

11. CONFER 4783/00, Joint Statement of Italy and Germany, 4 October

12. CONFER 4786/00, Closer cooperation, 18 October.

13. CONFER 4787/00 Benelux Position, 19 October.

14. CONFER 4798/00, Closer cooperation13 November.

15. CONFER 4810/00, 7 December.

16. CONV 422/02, Contribution by Mr Dominique de Villepin and Mr Joschka Fischer, members of the Convention, presenting joint Franco-German proposals for the European Convention in the field of European security and defence policy, 22 November,

17. CONV 435/02, Contribution by Mr Joschka Fischer and Mr Dominique de Villepin, members of the Convention: "Joint Franco-German proposals to the European Convention on an area of freedom, security and justice ", 28 November.

18. CONV 426/02, Final report of Working Group X "Freedom, Security and Justice", 2 December.

19. CONV 461/02, Final report of Working Group VIII – Defence, 16 December

20. European Convention, Official Website, http://european-convention.eu.int

21. European Council (1993a), Presidency Conclusions, Copenhagen European Council, 21-22 June.

22. European Council (1993b), Presidency Conclusions, Brussels European Council, 10-11 December.

23. European Council (1994), Presidency Conclusions, Corfu European Council, SN 100/94, 24-25 June.

24. European Council (1995), Presidency Conclusions, Madrid European Council, SN 400/95, 15-16 December.

25. European Council (1996a), Presidency Conclusions, Turin European Council, http://europa.eu.int/en/record/turin.html, March 29 March.

26. European Council (1996b), Presidency Conclusions, Florence European Council, SN300/96, 21-22 June.

27. European Council (1996c), Presidency Conclusions, Dublin European Council, SN401/1/96, 13-14 December.

28. European Council (1999a), Presidency Conclusions, Cologne European Council,

29. European Council (1999b), Presidency Conclusions, Helsinki European Council,

30. European Council (2001), Presidency conclusions, Laeken European Council, SN 300/1/01 REV 1, 14-15 December.

31. European Council (2003a), Presidency Conclusions, Thessaloniki European Council, 19-20 June.

32. European Council (2003b), Presidency Conclusions, Brussels European Council, 5381/04 POLGEN 2, 12-13 December.

33. European Council (2004a), Presidency Conclusions, Brussels European Council, 9048/04 POLGEN 20 CONCL 1, 25-26 March.

34. European Council (2004b), Presidency Conclusions, Brussels European Council, CIG 85/04, 17-18 June.

35. European Parliament (1995a), Draft working document on variable integration: principles and fields of application (PE 211.102/rev)

36. European Parliament (1999) Resolution on the preparation of the reform of the treaties and the next Intergovernmental Conference, C5-0143/1999-1999/2135 (COS), 17 November.

37. European Parliament (2000a) Resolution on the convening of the Intergovernmental Conference, 14094/1999-C5-0341/1999-1999/0825 (CNS), 3 February.

38. European Parliament (2000b) Report on the European Parliament's proposals for the IGC- Part I: Motion for a resolution, A5-0086/2000, 27 March.

39. Irish Presidency (2004), Report on the Intergovernmental Conference to European Council in Brussels of 25-26 March 2004, CIG 70/04, 24 March.

40. Italian Presidency (2003), Consolidated set of proposals from the Presidency to the delegations, Addendum 1 to the Presidency's proposal, CIG 60/03 ADD 1 Annex 44, 9 December.

41. Reflection Group (1995) *Reflection Group's Report*, http://www.europarl.eu.int/enlargement/cu/agreements/reflex2_en.htm#2

42. Spanish Document (1995), "The 1996 Intergovernmental Conference: bases for discussion", March 6, (http://europa.eu.int/en/agenda/igc-home/ms-doc/state-es/discussn.html).

SECONDARY RESOURCES

1. Aggestam, L. (2001) "The European Union at the crossroads" in Curzon Price, V. *et.al.* (Eds.) *The Enlargement of the European Union, Issues and Strategies,* London: Routledge, pp.93-97.

2. Areilza, Jose M. De (2001) "The Reform of Enhanced Cooperation Rules: Towards Less Flexibility?" Faculdade de Direito da Universidade Nova de Lisboa, Francisco Lucas Pires Working Paper Series on European Constitutionalism, WP 2001/01. http://www.fd.unl.pt/je/wpflp01a.doc (3.11.2002)

(final version "The Many Faces of Differentiation in EU Law", ed. Vos, de Witte and Henf, Intersentia Publishing, 2001)

3. Barbier, C. (2004) "A Multi-speed Europe" Tomorrow Europe, February 2004, No.21, www.ciginfo.net/demain/files/tomorrow21en.pdf (29.07.2004)

4. *BBC News*, 13 December 2003.

5. Best, E. (2001) "The Treaty of Nice: Not Beautiful but It'll Do", European Institute of Public Administration, (eipascope No. 2001/1, pp. 2-9). www.euractiv.com

6. Brown, T. (2002) "Enhanced Cooperation, A Two Tier Europe?", Dublin: Institute of European Affairs, http://www.iiea.com/futeuro/tb_ecatte.pdf

7. Centre for Economic Policy Research (1995) *Flexible Integration: Towards a More Effective and Democratic Europe,* Monitoring European Integration Series, Vol. 6, London.

8. Chirac, J. "Our Europe", Berlin June 2000. Speech in, *The Future of Europe Debate: Speeches and Statements 1999-2001*, Brown, T. (Ed.) (2001) Institute of European Affairs, Dublin.

9. Church, C. H. (2002) "The Evolving Union: The Treaties of Amsterdam and Nice" (Chapter 4) in *The European Union Handbook,* 2nd Ed., Gower, J. (Ed.) London, Chicago: Fitzroy Dearborn Publishers, pp. 51-64.

10. Dehausse, R (Ed.) (1997) *Europe: The Impossible Status Quo,* Houndmills: Macmillan, Chapter 1, Chapter 7.

11. Dehausse, F. (1998) "Institutional Reform and the Enlargement of the European Union" in Herolf, G. (Ed.) *EU Enlargement and Flexibility,* Stockholm: Ultrikespolitiska Institute, pp. 21-33.

12. Dehousse, F. and Coussens, W. (2004) " Flexible Integration: Potential Applications?" , Integrating Europe, Multi speeds- One Direction?, EPC Working Paper, European Policy Center, Brussels, April 2004, pp. 4-38. http://www.irri-kiib.be/papers/IWP_PE.pdf (29.07.2004).

13. De La Serre, F. (2000) "One Europe or Several: Between Cohesion and Flexibility," Challenge Europe: Issue One: Reforming the EU, The European Policy Centre, http://www.theepc.be

14. De Witte, B. (2004), "The European Constitutional Treaty: Where Does it Come From and Where Will it Lead To?", Keynote Speech at Maastricht EU kick off meeting, 1 July 2004. http://www.unimaas.nl/forum-maastricht/keynotewitte.htm (28.07.2004)

15. Dinan, D and Vanhoonacker, S. (2000-2001) "IGC 2000 Watch Series" www.eustudies.org/IGCWatchSeries.html, (14.01.2001)

16. Edwards, G. and Philippart, E. (1997) *Flexibility and the Treaty of Amsterdam: Europe's New Byzantium?* (CELS Occasional Paper No.3), Cambridge: University of Cambridge Faculty of Law.

17. Edwards, G. and Wiessala, G. (2001) "Conscientious Resolve: The Portuguese Presidency of 2000", *JCMS,* Vol. 39, Annual Review, pp. 43-47.

18. Ehlermann, C. D. (1995) "Increased Differentiation or Stronger Uniformity" *EUI Working Paper* RSC No. 95/21.

19. Ehlermann, C. D. (1997) *Differentiation, Flexibility, Closer Cooperation: The New Provisions of the Amsterdam Treaty,* Fiesole: Robert Schuman Centre, European University Institute.

20. Esposito, F. (2001) "The IGC: facing the enlargement's dilemma" in Curzon Price, V. *et.al.* (Eds.) *The Enlargement of the European Union, Issues and Strategies,* London: Routledge, pp.97-111.

21. EU Dictionary, http://www.euro-know.org/dictionary

22. Fischer J., "From Confederation to Federation" , Berlin, May 2000. Speech in, *The Future of Europe Debate: Speeches and Statements 1999-2001*, Brown, T. (Ed.) (2001) Institute of European Affairs, Dublin.

23. Fratianni, M. (1996) "Variable Integration in the European Union" www.indiana.edu/~busecon/workpaps/PAPERS/acrobat/96019.pdf (TARİH)

24. Galloway, D. (2001) *The Treaty of Nice and Beyond, Realities ans Illusions of Power in the EU,* Sheffield: Sheffield Academic Press.

25. Gillespie, P. (1997) "The Promise and Practice of Flexibility" in Tonra, B. (Ed.) *Amsterdam, What the Treaty Means,* Dublin: Institute of European Affairs, pp. 49-64.

26. Gillespie, P. (2001) "Enhanced Cooperation" in Dooge, J. and Keatinge, P. (Eds.) *What the Treaty of Nice Means,* Dublin: Institute of European Affairs, pp. 77-93.

27. Gray M. and Stubb, A. (2001) "Key Article: The Treaty of Nice- Negotiating a Poisined Chalice?", *Journal of Common Market Studies,* Vol.39, No.1, pp.5-22.

28. Grevi, G. (2004), "Flexible Means to Further Integration", Integrating Europe, Multi speeds- One Direction?, EPC Working Paper, European Policy Center: Brussels, April 2004, pp__38-65. http://www.irri-kiib.be/papers/IWP_PE.pdf, (29.07.2004).

29. Hall, B. (2000a) *How Flexible Should Europe be?* London: Centre for European Reform Working Paper

30. Herolf, G. (1998a) "Enlargement and Flexibility- Recurrent Items on the Agenda" in Herolf, G. (Ed.) *EU Enlargement and Flexibility,* Stockholm: Ultrikespolitiska Institute, pp.3-12.

31. Herolf, G. (1998b) "Flexibility and the Future" in Herolf, G. (Ed.) *EU Enlargement and Flexibility,* Stockholm: Ultrikespolitiska Institute.

32. Honor M. (2004), "Constitution for Europe agreed", EU observer, 18.06.2004 www.euoserver.com (21.06.2004)

33. Kohnstamn, M. (1997) "Flexibility- a False Start", *Challenge 96 Report on Flexibility,* Brussels: European Policy Centre, March.

34. Miller, Vaughne (2000) "IGC 2000: Enhanced Cooperation" Research Paper 00/88. (Library of House of Common) www.parliament.uk/commmons/lib/research/rp2000/rp00-088.pdf

35. Lamoureux, F. (2004) "Draft Constitution: why a "rear guard" should be established?", http://www.notre-europe.asso.fr/fichiers/Lamoureux-en.pdf (08.08.2004)

36. La Serre, E. and Wallace, H. (1997) *Flexibility and Enhanced Cooperation in the European Union: Placebo Rather Than Panacea,* Paris: Research and Policy, Papers No 2, Notre Europe.

37. Laursen, F. (2002) *Nice and Post-Nice: Explaining Current and Predicting Future Developments in the EU,* http://www.lib.edu.tr/libeu/eulecture/Nice%29and%20 (05.02.2002)

38. Lobjakas, A. (2003) "Collapse of EU Constitution Talks Could Lead to "Two-speed" Union", Radio Free Europe, http://www.masterpage.com.pl/outlook/twospeedeu_rfe.html (24.05.2004)

39. Major, J. (1994) "John Major's Speech to the Conservative Party Conference" http://www.australianpolitcs.com/uk/tories/941016major-conference-speech-shtml (13.05.2003)

40. Parmentier, G. (1998) "Security and Defence Policy- The Use of Flexibility" in Herolf, G. (Ed.) *EU Enlargement and Flexibility,* Stockholm: Ultrikespolitiska Institute, pp. 79-85.

41. Philippart, E. and Edwards, G. (1999) "The Provisions on Closer Cooperation in the Treaty of Amsterdam", *Journal of Common Market Studies,* 37, 1.

42. Philippart, E. (2001) "The New Provisions on "Closer Cooperation": A Call for Prudent Politics" in *ESCA Review Forum: Analyzing the Treaty of Nice,* http://www.eustudies.org/NiceTreatyForum.html (27.03.2002)

43. Schroeder G., and Amato G., "The Future of Europe", September 2000. Joint Statement in, *The Future of Europe Debate: Speeches and Statements 1999-2001*, Institute of European Affairs, Dublin 2001.Editor, Brown T.

44. Shaw, J. (2002) *Enhancing Cooperation after Nice: Will the Treaty Do the Trick?,* htttp://home.um.edu.mt/edrc/shaw.doc (09.05.2003)

45. Stubb, A. C. G. (1996) "A Categorisation of Differentiated Integration" in *Journal of Common Market Studies,* Vol. 34, No. 2, June, pp.283-295.

46. Stubb, A. C. G. (1998), *Flexible Integration and the Amsterdam Treaty, Negotiating Differentiation in the 1996-97 IGC,* PhD Thesis, London: London School of Economics and Political Science.

47. Stubb, A. C. G. (2000a) "Negotiating Flexible Integration in the Amsterdam Treaty" in *European Integration After Amsterdam, Institutional Dynamics and Prospects for Democracy,* Neunreither, K. and Weiner, Antje (Eds.) Oxford, New York: Oxford University Press, pp. 153-175.

48. Stubb, A. C. G. (2000b) "Dealing with Flexibility in the IGC" in *Rethinking of the European Union, IGC 2000 and Beyond*, Best, E. *et.al.* (Eds.) Maastricht: European Institute of Public Administration, pp.145-159.

49. Stubb, A. C. G. (2002) *Negotiating Flexibility in the European Union; Amsterdam, Nice and Beyond,* Hampshire, New York: Palgrave

50. Thatcher, M. (1988) "Britain and Europe", http://www.eu-konvent.dk/konventdokumenter/baggrund/thatcher/ (13.05.2003)

51. *The Guardian*, 15 December 2003.

52. *The Economist,* "A Flexible Europe", 01/18/97, Vol.342 Issue 8000.

53. *The Economist,* "Order A la Carte?", 4/22/2000, Vol.355 Issue 8167.

54. *The New York Times*, 14 December 2003.

55. *The Washington Times*, 14. December 2003

56. Thürer, D. "A Variable Geometry for Europe" http://www.ıvr.unizh.ch/dokumente/variable.pdf (08.05.2003)

57. Ulrich, B. (2001) "EU Enlargements and Limits to Amendments of the EC Treaty" *Jean Monnet Working Papers 15/01.* http://www.jeanmonnetprogram.org/papers/01/013801

58. Wallace, H. (2000) "Flexibility: A Tool of Integration or a Restraint on Disintegration?" in *European Integration After Amsterdam, Institutional Dynamics and Prospects for Democracy,* Neunreither, K. and Weiner, Antje (Eds.) Oxford, New York: Oxford University Press, pp.175-192.

59. Wallace, H. and Wallace, W. (1995) *Flying Together in a larger and more diverse European Union,* The Hague: Working Documents, Netherlands Scientific Council for Government Policy

60. Warleigh, A. (2002) *Flexible Integration; Which Model for the European Union?* London, New York: Sheffield Academic Press.

61. Weatherill, S. (2000) "Flexibility and Fragmentation: Trends in European Integration" in *The State of the European Union,* Usher, J. A. (Ed.), Harlow: Pearson Education Limited, pp.1-21.

62. Wijkman, P. M. (1998) "Variable Geometry and Multispeed Integration within the EU" in Herolf, G. (Ed.) *EU Enlargement and Flexibility,* Stockholm: Ultrikespolitiska Institute, pp. 71-75.

63. Yataganas, X. A. (2001) "The Treaty of Nice: The Sharing of Power and the Institutional Balance in the European Union. A Continental Perspective" Harvard Law School *Jean Monnet Working Paper 01/00,* http://www.jeanmonnetprogram.org/papers/01/010101.rtf